88-319

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-

THORNBURY TOWNSHIP
and JOHN G. COPELAND, JR.,
Petitioners

vs.

W.D.D., INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

Does an appeal, filed during the pendency of a timely F.R.A.P. 4(a) motion, and therefore a nullity under *Griggs v. Provident Consumer Discount Company,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed. 2d 255 (1982), and dismissed by a motions panel of the Court of Appeals, without benefit or consideration of the case's full record and the parties' briefs on the merits of the appeal, on the ground that no appeal could lie under *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1986) where the district court found a question of fact, prevent a later panel or the court en banc from reaching the merits of the second appeal filed in the case timely after disposition of the F.R.A.P. 4(a)(4) motion?

Did the Court of Appeals err in holding that petitioner Township was not entitled to appeal under *Mitchell, supra,* on the ground that it did not claim immunity from suit, when the Township in fact had made and pressed such a claim both in the district court and in the Court of Appeals?

Is a municipal entity, sued for damages as a person itself under *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), precluded by *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980), from raising in its own separate, non-derivative defense the objective qualified immunity formulated in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982) and from immediate appeal of an order denying its motion for summary judgment on the ground that its action or policy did not violate clearly established rights under *Mitchell, supra*?

LIST OF PARTIES

The caption contains the names of all the parties in the lower courts.

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W.D.D., INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thornbury Township and John G. Copeland, Jr. respectfully petition this Honorable Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in *W.D.D., Inc. v. Thornbury Township*, 850 F.2d 170 (3rd Cir. 1988).

OPINIONS BELOW

The opinion of the Court of Appeals En Banc, reproduced in full in Appendix A, *infra,* has been reported as *W.D.D., Inc. v. Thornbury Township,* 850 F.2d 170 (3rd Cir. 1988), and may be found through Lexis at 1988 U.S. App. Lexis 8746. The vacated panel opinion of the Court of Appeals, reproduced in full at Appendix B, *infra,* had been reported in the advance sheets as *W.D.D., Inc. v. Thornbury Township,* 839 F.2d 151 (3rd Cir. 1988), and may be found at 1988 U.S. App. Lexis 1495. The district court's opinions have not been reported, but its June 23, 1987 opinion, reproduced in full at Appendix C, *infra,* may be found at 1987 U.S. Dist. Lexis 5502, and at 1987 WL 12851; its March 19, 1987 opinion, reproduced in full at Appendix D, *infra,* may be found at 1987 U.S. Dist. Lexis 2140 and at 1987 WL 4756; and its August 8, 1986 opinion, reproduced in full at Appendix E, *infra,* may be found at 1986 U.S. Dist. Lexis (Slip. Opinion) and at 1986 WL 8714.

STATEMENT OF SUPREME COURT JURISDICTION

The decision of the Court of Appeals to be reviewed is dated and was entered on June 28, 1988. No petition for rehearing was filed following entry of that decision. This petition is filed within ninety days of the entry of that decision. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution states in pertinent part:

> "No person shall be . . . deprived of . . . liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of . . . liberty, or property, without due process of law . . . ".

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State or Territory where the District of Columbia subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secure by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

28 U.S.C. §1291 provides in pertinent part that:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district court of the United States, . . . except where a direct review may be had in the Supreme Court . . . ".

STATEMENT OF THE CASE

The district court had original subject matter jurisdiction over respondent's 42 U.S.C. §1983 Fifth and Fourteenth Amendment claims against petitioners under 28 U.S.C. §1343, and respondent's complaint, which stated claims only under Section 1983, was properly removed from the state court in which it was originally filed to the district court pursuant to 28 U.S.C. §§1441(b) and 1443. At issue is the appellate jurisdiction of the Court of Appeals.

Eventually disavowing a claim that petitioners impermissibly condemned or took its property, and eventually abandoning its claims for injunctive relief, respondent W.D.D., Inc. commenced and prosecuted this action to recover com-

pensatory and punitive damages from respondents Thornbury Township and John G. Copeland, Jr. under 42 U.S.C. §1983 for alleged violations of W.D.D.'s Fifth and Fourteenth Amendment liberty and due process rights in connection with W.D.D.'s planned development of land located in Thornbury Township, Chester County, Pennsylvania. The gravamen of W.D.D.'s claim focused upon: (1) petitioner Copeland's appearance through counsel to voice his objections, shared by others and eventually vindicated by the state courts on appeal, as a private citizen to the zoning variances sought by W.D.D. from the local Zoning Board with the testimonial support of two of the incumbent Township supervisors; (2) respondent Township's later constituted Board of Supervisors' decision to intervene in that appeal, which was was commenced and prosecuted by two private individuals from the Zoning Board's decision to grant the variances sought by respondent W.D.D.; and (3) the Board's simultaneous decision to deny approval of W.D.D.'s preliminary subdivision plan, which, three weeks later in a separate mandamus action brought by W.D.D., the state court deemed approved. Reciting only these events in its complaint against petitioners, W.D.D. charged that these actions were inconsistent with an alleged commitment by two of the prior three members of the Board of Supervisors to support W.D.D.'s request for variances from the Zoning Board, which were allegedly necessitated by recommendations of those prior board members, and incorporated into W.D.D.'s proposed development plan. W.D.D. claimed that those three actions in which petitioner Copeland was involved violated W.D.D.'s "liberty" and "due process" rights under the Fifth and Fourteenth Amendments and thus violated 42 U.S.C. §1983.

On September 3, 1986, petitioners filed a motion for summary judgment to terminate this litigation, contending that they had not violated W.D.D.'s clearly established constitutional rights and should not have been sued or be subjected to further litigation. On April 10, 1987 following

entry of the district court's March 19, 1987 order denying the motion for summary judgment, counsel for petitioners filed a notice of appeal (later docketed by the Court of Appeals at No. 87-1204), and referred the matter to appellate counsel, without informing appellate counsel that a motion for reconsideration had been filed and served for petitioners on March 30, 1987.[1] In response to an inquiry concerning the Court of Appeals' jurisdiction from the Court's staff attorney, who commented that the appeal appeared to be premature and would be submitted to a motions panel for possible dismissal, appellate counsel for petitioners, still unaware of pending motion for reconsideration, stated in a letter brief that the appeal had been taken from a final order pursuant to *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985). Three days later, on April 27, 1987, the attorney representing W.D.D. in both the district court and the Court of Appeals responded to the Court of Appeals that the appeal was premature in light of the undecided motion for reconsideration. On May 13, 1987, a motions panel of the Court of Appeals issued an order which simply stated, "Ordered that the appeal is dismissed" (Appendix I). Subsequently granting petitioners' motion for clarification, the motions panel issued an order on May 28, 1987, which advised that "The appeal was dismissed as premature becuase the district court found that material facts were in dispute as to Copeland's immunity defense" (Appendix H). On June 11, 1987, appellate counsel for petitioners filed a petition for rehearing of the motions panel's dismissal order, contending that the district court's perception of a question of fact could not alone prevent an appeal, and, when made aware of the still pending motion in the district court, sent a letter brief, filed in the Court of Appeals on July 1, 1987, suggesting that the Court of Appeals lacked jurisdiction because the notice of appeal was a nullity in

1. The motion was timely under F.R.C.P. 59 because March 29, 1987, fell on a Sunday. No question has been raised challenging the timeliness of the motion or its treatment as a Rule 59 motion.

light of the undecided but timely filed motion for reconsideration under *Griggs v. Provident Consumer Discount Company,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed. 2d 225 (1982). On July 1, 1987, the Court of Appeals issued an order denying the petition for rehearing (Appendix G).

In the meantime, on June 23, 1987, the district court issued an order denying petitioners' motion for reconsideration of the order denying their motion for summary judgment. Petitioners filed a new notice of appeal on June 30, 1987, which was docketed in the Court of Appeals on July 6, 1987 at No. 87-1382. Having the benefit of the parties' briefs and the appendix to the briefs which the prior motions panel did not have, the merits panel decided the matter on February 8, 1988. In its unanimous opinion (Appendix B), reported in the advance sheets at 839 F.2d 151 (3rd Cir. 1988), the merits panel dismissed petitioner Township's appeal on the ground that it had not claimed immunity from suit and that it was not entitled to immunity under *Hynson v. City of Chester,* 827 F.2d 932, 934 (3rd Cir. 1987), *cert. den.* sub nom. *Delaware Cty. Prison Bd. v. Hynson,* — U.S. —, 108 S.Ct. 702, 98 L.Ed. 2d 653 (1988). With respect to petitioner Copeland, however, the merits panel held that he did claim qualified immunity and could, pursuant to *Mitchell, supra,* appeal to determine the purely legal question "Whether the official's conduct violated a legal norm which was clearly established at the time of the alleged illegal conduct" (Appendix B, pg. 10a). The merits panel also held that Copeland was immune because W.D.D. failed to show that his actions violated any clearly established right, and that there was no need to reach the question "which the prior appellate decision in this case addressed . . . as to Copeland's state of mind when he acted with respect to W.D.D.'s subdivision plan" (Appendix B, pg. 10a, n.4).

Respondent W.D.D. then filed a petition for rehearing, principally contending that the February 8, 1988 decision "is inconsistent with both the May 13, 1987 Order of another panel of the Court dismissing Defendants' Appeal in its

entirety and the July 1, 1987 Order of the Court denying Defendants' Petition for Rehearing of the May 13, 1987 Order both of which Orders had the effect of affirming the District Court" (W.D.D.'s Petition for Rehearing, pg. 3, ¶7). On March 31, 1988, the Court of Appeals granted W.D.D.'s petition for rehearing, scheduled the matter for reargument before the Court En Banc, and vacated the panel's opinion (Appendix F).

On June 28, 1988, the evenly divided Court of Appeals dismissed the petitioners' appeal (Appendix A, pg. 2a, ¶1). As to petitioner Township, and in apparent conflict with the earlier merits panel's holding that the Township was not entitled to claim immunity or to appeal a denial of its claim of objective qualified immunity under *Mitchell,* the en banc per curiam opinion stated that, while 28 U.S.C. §1291 generally does not give the court jurisdiction to consider the denial of a motion for summary judgment, there is an exception to this rule when the appeal centers on the denial of a claim of immunity. However, the Court held:

> "Thornbury Township, however, does not claim immunity from suit. Its entire argument, both in the district court and on appeal, is that under the applicable law of 1983 claims it is entitled to summary judgment. Since there has been no final judgment in this case, and since the Township does not raise a claim of immunity, this court has no jurisdiction to decide whether the district court properly refused to grant summary judgment."

The Court dismissed the Township's appeal.

Contrary to the Court's perception, petitioner Township had claimed that it was entitled to summary judgment and immune from suit. Although the record is replete with other examples, this claim of immunity was explicitly made in paragraph 21 of the petitioners' motion for reconsideration of the district court's denial of summary judgment, in its Civil Appeal Information Statement filed at the commencement of the appeal in No. 87-1204, in their statement of contents of the appendix and statement of the issues

presented in No. 87-1382, at pgs. 1 and 3 and other pages of their Brief for Appellants, and at pg. 10 in the succeeding pages of its Reply Brief for Appelants. In addition, respondent W.D.D. never suggested to the Court of Appeals that petitioner Township had not claimed the immunity overlooked by the Court of Appeals.

As to petitioner Copeland's appeal, the per curiam en banc opinion recited:

> "Appellant Copeland, a member of the Thornbury Township Board of Supervisors when this case arose, appeals from an order denying reconsideration of an order that had denied his motion for summary judgment on the ground of qualified immunity, which we shall treat as an appeal from the order denying summary judgment. Because the court is equally divided as to the appealability of the order in the present posture of this case, the appeal will be dismissed."

For the reasons that follow, petitioners respectfully submit that the Court of Appeals did have jurisdiction to consider the merits of petitioners' appeal.

ARGUMENT: REASONS FOR ALLOWANCE OF WRIT

1. The Court of Appeals had subject matter jurisdiction to consider the second appeal.

In its per curiam opinion, the Court of Appeals en banc stated that it treated the appeal from the order denying the motion for reconsideration of the order denying summary judgment as an appeal from the order denying summary judgment. However, the twelve judges which sat on the en banc court were equally divided as to the appealability of the order, and dismissed the appeal. Even though the second notice of appeal did not specifically name the order denying summary judgment, the Court of Appeals was correct in treating that notice of appeal as encompassing the order denying summary judgment, *Foman v. Davis,* 371 U.S. 178, 181-182, 83 S.Ct. 227, 229-230, 9 L.Ed. 2d 222 (1962); *Bank-*

ers Trust Company v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed. 2d 357 (1978) *Castle v. Sangamo Weston, Inc.,* 837 F.2d 1550, 1557-1558 (11th Cir. 1988). Influenced by respondent's arguments that the motions panel's dismissal order ended the Court of Appeals' jurisdiction, the en banc court fell into error in dismissing the second appeal.

The first appeal and the motions panel's dismissal of that appeal should not have deprived either the later merits panel or the court en banc of appellate jurisdiction. In *Griggs v. Provident Consumer Discount Company,* 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed. 2d 225 (1982), this Honorable Court made it explicitly clear that notices of appeal filed before or after the pendency of a timely Rule 59 motion are ineffective nullities, and the Court stated, "In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." Petitioners' motion for reconsideration of the order denying their motion for summary judgment is properly treated as a Rule 59 motion, *Richerson v. Jones,* 572 F.2d 89, 93 (3rd Cir. 1978); *Sonnenblick-Goldman Corporation v. Nowalk,* 420 F.2d 858 (3rd Cir. 1970); *Gainey v. Brotherhood of Railway & Steam Ship Clerks,* 303 F.2d 716, 718 (3rd Cir. 1962) ("... the courts which have considered the problem seem to have experienced no difficulty in concluding that a motion for rehearing or reconsideration made within ten days after the entry of an appealable order is within the coverage of Rule 59 . . ."); *In Re: Stringer,* 847 F.2d 549, 550 (9th Cir. 1988); *Nichols v. Asbestos Workers' Local 24 Pension Plan,* 835 F.2d 881, 887-888 (D.C. Cir. 1987) *United States v. Gargano,* 826 F.2d 610 (7th Cir. 1987). The motion for reconsideration was timely under Rule 59, because it was served and filed within ten judicial business days of the entry of the order denying the motion for summary judgment. In this case, the order denying summary judgment was entered on March 19, 1988, and the motion for reconsideration was served and filed on March 30, 1987, because March 29, 1987 fell on a Sunday. Thus, because the

first appeal was filed during the pendency of a timely Rule 59 motion, the first appeal was a nullity, and its filing and disposition could have no effect on the second appeal. In *Sonnenblick-Goldman, supra,* 420 F.2d at 861, the Court of Appeals correctly observed that "any substantive action a court takes on an untimely motion is a nullity", and that reasoning equally applies to any action taken on an appeal which is a nullity.

The dismissal of the second appeal in this case, which was influenced by the filing and disposition of the first appeal in this case, conflicts with this Honorable Court's decision in *Griggs,* and with the decisions of other courts of appeals which have given no effect to an appeal filed during the pendency of a timely motion to reconsider, *In Re: Stringer, supra, Nichols, supra, U.S. v. Gargano, supra.* The decision also conflicts with the decisions of other courts of appeals which have ignored the first appeal and reached the merits of the case under the second notice of appeal filed timely after the denial of the pending Rule 59 motion, *Stringer, supra, Castle, supra.*

The dismissal of the second appeal in light of the first appeal cannot be justified by pointing to petitioner's expression of an opinion to the Court of Appeals that the first appeal was valid. A party is not estopped to deny jurisdiction, although that party originally conceded that jurisdiction existed. As correctly observed by the Court of Appeals in *Osterneck v. E.T. Barwick Industries, Inc.,* 825 F.2d 1521, 1525 n.5 (11th Cir. 1987), ". . . it is well settled that, as courts of limited jurisdiction, federal courts are obliged to undertake a jurisdictional inquiry whenever it appears that, in fact, no jurisdiction exists. [Citations omitted]. Thus, any prior stipulation by the parties notwithstanding, the issue of our jurisdiction is now before us and must be addressed." The parties may not confer jurisdiction on a court where jurisdiction does not exist, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxities de Guinee,* 456 U.S. 649, 702, 102 S.Ct. 2099, 2104, 72 L.Ed. 2d 492 (1982).

Moreover, the Court en banc is not bound by prior panel opinions, but has the power and the right in appropriate cases to overrule panel opinions, *Fast v. School Dist. of City of Ladue,* 728 F.2d 1030, 1034 (8th Cir. 1984). The Court En Banc was obviously empowered to review and overrule the motions panel's prior decision. It was not bound to accept the motions panel's reasoning or result.

In addition, although the "law of the case" doctrine dictates that the holdings of a previous panel in the case must be followed by later panels, the doctrine does not bar consideration of an issue not resolved in the earlier appellate proceedings, and a statement which is not a decision on the merits does not bar reaching the merits, *Adams-Lundy v. Association of Professional Flight Attendants,* 844 F.2d 245, 247-248 (5th Cir. 1988). The law of the case doctrine is not binding if the decision was clearly erroneous and to follow it would work a manifest in justice, or if facts not known on the first appeal become known in the second appeal, *J.E.T.S., Inc. v. United States,* 838 F.2d 1196, 1200 (Fed. Cir. 1988). The law of the case doctrine does not prohibit reconsideration of important issues of law that had not been previously resolved to correct any uncertainty resulting from the previous ruling, *Appleton Electric Co. v. Graves Truck Line, Inc.,* 635 F.2d 603, 608 (7th Cir. 1980). If a panel of a court of appeals "cannot be expected to reverse a correct decision by one district judge simply because we find it is contrary to a prior ruling by another district judge in the same case, i.e. contrary to the 'law of the case'," *Peterson v. Londer,* 765 F.2d 698, 704 (7th Cir. 1985), why should a court of appeals en banc vacate a correct decision by a panel simply because that decision appears out of harmony with a prior ruling by a motions panel in the same case? In addition, "purported decisions made without power of authority to make them cannot be considered as the law of the case in a subsequent appeal through the proper jurisdictional channels", *Russell & Company v. People of Puerto Rico,* 118 F.2d 225, 229 (1st Cir. 1941).

The filing of the first appeal and its dismissal by the motions panel stood as no jurisdictional impediment to the later panel or to the Court en banc in reaching the merits of the appeal. The decision by the equally divided Court en banc to dismiss the second appeal was erroneous and in conflict with the decisions of this Honorable Court and decisions from other courts of appeals. The per curiam opinion of the Court en banc provides no resolution to the important jurisdictional question which it leaves undecided, provides no further guidance to litigants within the Third Circuit, and deprives petitioners of effective appellate review simply because the Court was hopelessly deadlocked on a question which it should have resolved in petitioners' favor.

2. The Court of Appeals erred in concluding that petitioner Township had not claimed immunity.

In its per curiam opinion, the Court of Appeals en banc decided to dismiss the Township's appeal because it perceived that the Township had not claimed immunity from suit. That opinion indicates that the Township would have been entitled to an appeal under *Mitchell v. Forsyth, supra,* had it made such a claim. The dismissal of the appeal on the ground that the claim was not made is clearly erroneous and should be vacated. Both in the district court and in the Court of Appeals, the Township consistently argued that it was entitled to a summary end of this litigation, that it violated no clearly established right of plaintiff W.D.D., and that it was immune from any further litigation in this case. Although the Township's arguments did not always use the word immunity, it explicitly invoked immunity from suit in its motion for reconsideration, in the statements which it filed defining its appeal to the Court of Appeals and to the appellee, and its principal and reply briefs in the Court of Appeals. Respondent W.D.D. never asserted, either in the district court or in the Court of Appeals, that the Township was not claiming the same type of objective qualified immu-

nity as claimed by Mr. Copeland, which the Court of Appeals correctly recognized. In ignoring the Township's claim for summary relief and its invocation of this objective qualified immunity, the Court of Appeals so far departed from accepted practice that the intervention of this Honorable Court is necessary to effect justice.

3. Petitioner Township should be afforded the same objective qualified immunity afforded to its official.

The merits panel's decision to dismiss the Township's appeal on the ground that the Township was not entitled to the same objective qualified immunity defense afforded to its official should be reviewed by this Honorable Court "[b]ecause of the importance of the immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government", *Butz v. Economou*, 438 U.S. 478, 480-481, 98 S.Ct. 2894, 2897, 57 L.Ed. 2d 859 (1978); because this decision unduly extends the holding of this Honorable Court in *Owen supra*; because the decision frustrates the admonitions and policy objectives reiterated in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982) and furthered in *Mitchell, supra*; because the decision runs counter to the precepts most recently reaffirmed by this Honorable Court in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed. 2d 806 (1986), and in *Anderson v. Creighton*, — U.S. —, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987); and because the decision makes little acceptable practical or jurisprudential sense.

In *Owen, supra*, the municipality attempted to defend against the liability consequent upon the execution of its unconstitutional policy by asserting the subjective good faith of its officers who implemented that policy. Rejecting that vicarious or derivative subjective good faith defense, this Honorable Court explicitly held that "the municipality may not assert the good faith of its officers or agents as a defense to liability under §1983", 445 U.S. at 638, 100 S.Ct. at 1409

(footnote omitted). The truly limited scope of this holding was reconfirmed seven months later when the Court unanimously observed that "in *Owen v. City of Independence, supra,* a municipality's claim that it could assert the immunity of its officers and agents in §1983 damages action was rejected since there was no basis for such a right at common law", *Dennis v. Sparks,* 449 U.S. 24, 29, 101 S.Ct. 183, 187, 96 L.Ed. 2d 185 (1980).

The decision of the merits panel in this case, however, extends the holding of *Owen* beyond the derivative subjective good faith defense, an issue not raised by petitioner here, to subsume and extinguish the distinct defense actually asserted by petitioner: A municipal person's own right to quick termination of insubstantial lawsuits by asserting objective immunity to dismiss the Section 1983 claim because its policy did not violate clearly established constitutional rights. The decision of the merits panel unduly extends the narrow holding of *Owen* and inters a sound, practical defense that this Honorable Court had not formulated until two years after *Owen* when it decided *Harlow, supra,* in 1982.

In *Harlow, supra,* this Honorable Court agreed that "public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial", 457 U.S. at 813, 102 S.Ct. at 2736. In *Mitchell, supra,* the Court furthered that objective by holding that orders denying summary judgment on *Harlow's* objective immunity are immediately reviewable in advance of further litigation and trial, 472 U.S. at 524-530, 105 S.Ct. at 2815-2817. In both cases, the Court recognized that attendant to claims, such as that advanced in this case by respondent, are "social costs" which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office", *Harlow, supra,* 457 U.S. at 814, 102 S.Ct. at 2736, that insubstantial lawsuits "undermine the effectiveness of government as contemplated by a constitutional structure",

Harlow, supra, 457 U.S. n.34 at 819, 102 S.Ct. n.35 at 2739, and are "peculiarly disruptive of effective government", *Mitchell, supra,* 472 U.S. at 526, 105 S.Ct. at 2815. In *Harlow, supra,* the Court also recognized that "the dismissal of insubstantial lawsuits without trial" was "a factor presupposed in the balance of competing interests struck by our prior cases", 457 U.S. at 814, 102 S.Ct. at 2736, and that reliance upon its subjective qualified immunity formula "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment", 457 U.S. at 818, 102 S.Ct. at 2738. The Court reitereated its admonition that insubstantial suits should not be allowed to proceed to trial, *Harlow, supra,* 457 U.S. n.35 at 819, 102 S.Ct. n.35 at 2739, earlier expressed in *Butz, supra,* 438 U.S. at 507-508, 98 S.Ct. at 2911.

The social costs and disruptions of effective government which this Honorable Court has expressly sought to avoid must now be borne by petitioners as consequences of the merits panel's decision. "In order to implement the protection from suit, the standard governing the availability of this defense has evolved into one of objective reasonableness, designed to 'permit the resolution of many insubstantial claims on summary judgment' ", *Robinson v. Via,* 821 F.2d 913 (1st Cir. 1987). The decision of the merits panel adverse to petitioner undeniably upsets this design.

That decision also runs counter to the principles most recently reaffirmed by this Honorable Court in *City of Los Angeles v. Heller* and in *Anderson, supra.* The merits panel's decision, exposing petitioner Township to further litigation and an award of damages even though its officer inflicted no constitutional harm, contravenes the principle recently reaffirmed by this Honorable Court in *City of Los Angeles v. Heller, supra,* that neither *Monell,* nor "any other of our cases" authorizes an award of damages against a municipal corporation based on the actions of one of its officers when it has been concluded that the officer inflicted no constitutional harm, 475 U.S. at 799, 106 S.Ct. at 1573. That panel

decision also contravenes the precepts lately expressed by this Honorable Court in *Anderson, supra*, 107 S.Ct. at 3041-3042: "Although it is true that we have observed that our determinations as to the scope of official immunity are made in the light of the 'common-law tradition,' *Malley*, 475 U.S. [335], at 342, 106 S.Ct. [1092], at 1097, we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required that common law with an objective inquiry into the legal reasonableness of the official action. *See Harlow*, 457 U.S., at 815-820, 102 S.Ct. at 2736-2739. As we noted before, *Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board'." (Footnote omitted).

Finally, the dichotomy struck by the merits panel, between petitioner Township and its supervisor on the conduct of the supervisor, and between the prompt and protracted disposition of identical insubstantial claims that that conduct amounted to a policy in violation of civil rights despite the definition of the right and its clear establishment, makes little practical or jurisprudential sense. Prompt dismissal of insubstantial claims cannot be achieved when the lower courts refused to allow targeted governmental defendants to raise the *Harlow* objective immunity challenged to those claims. This dichotomy, in practical effect, provides only nominal dismissal of the officials. Because the entities that they are committed to serve remain parties to and must defend these insubstantial claims, those officials must still remain involved in the extended litigation, even after they have left office. The dichotomy also unquestionably does nothing to eliminate or minimize the social costs

and disruptions to effective government that this Honorable Court has sought to avoid.

In this important aspect of Section 1983 jurisprudence, only the exercise of supreme judicial and supervisory powers by this Honorable Court can deflect the confusion and disruptions created by the principle espoused by the lower court in this case.

CONCLUSION

For these reasons, petitioners respectfully request that this Honorable Court issue a writ of certiorari to review and to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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DATE: August 17, 1988

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1382

W.D.D., INC.

v.

THORNBURY TOWNSHIP, CHESTER COUNTY
and COPELAND, JOHN G., JR.
Appellants

Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 86-3972

Argued December 8, 1987

Reargued in banc May 10, 1988

Before: GIBBONS, Chief Judge, SEITZ,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN
and HUNTER, *Circuit Judges*
June 28, 1988

MARIA ZULICK, ESQ. (Argued)
ROBERT G. HANNA, JR. ESQ.
MARSHALL, DENNEHEY, WARNER,
COLEMAN AND GOGGIN
1515 Locust Street
Philadelphia, PA 19102
Attorneys for Appellants

LOUIS J. COLAGRECO, JR., ESQ. (Argued)
THOMAS A. RILEY, JR., ESQ.
RILEY LAW ASSOCIATES, LTD.
240 Daylesford Plaza
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Paoli, PA 19301

OPINION OF THE COURT

PER CURIAM

1. This is an action under 42 U.S.C. § 1983. Appellee W.D.D., Inc. ("WDD") alleged that its civil rights were violated in connection with certain land use restrictions imposed by a municipality. Appellants Thornbury Township and John G. Copeland, Jr. moved for summary judgment and then for reconsideration. The district court denied both motions. Upon rehearing in banc, we will vacate the prior panel opinion reported at 839 F.2d 151 (3d Cir. 1988), and dismiss the appeal as to both appellants.

I. *APPEAL OF THORNBURY TOWNSHIP*

2. Generally, 28 U.S.C. § 1291 does not give this court jurisdiction to consider the denial of a motion for summary judgment. *Metex Corp. v. ACS Industries, Inc.*, 748 F.2d 150, 153 (3d Cir. 1984); *Forsyth v. Kliendienst*, 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453 U.S. 913 (1981). There is an exception to this rule when the appeal centers on the denial of a claim of immunity. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). Appellant

Thornbury Township, however, does not claim immunity from suit. Its entire argument, both in the district court and on appeal, is that under the applicable law of § 1983 claims it is entitled to summary judgment. Since there has been no final judgment in its case, and since the Township does not raise a claim of immunity, this court has no jurisdiction to decide whether the district court properly refused to grant summary judgment. Therefore the Township's appeal will be dismissed.

II. *APPEAL OF JOHN C. COPELAND, JR.*

3. Appellant Copeland, a member of the Thornbury Township Board of Supervisors when this case arose, appeals from an order denying reconsideration of an order that had denied his motion for summary judgment on the ground of qualified immunity, which we shall treat as an appeal from the order denying summary judgment. Because the court is equally divided as to the appealability of the order in the present posture of this case, the appeal will be dismissed.

TO THE CLERK

Please file the foregoing opinion.

Circuit Judge

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1382

W.D.D., INC.

v.

THORNBURY TOWNSHIP, CHESTER COUNTY
and COPELAND, JOHN G., JR.
Appellants

Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 86-3972

Argued December 8, 1987

Before: GREENBERG, SCIRICA, and HUNTER,
Circuit Judges

Opinion filed February 8, 1988

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OPINION OF THE COURT

HUNTER, *Circuit Judge*

1. This is an action under 42 U.S.C. § 1983. Appellee W.D.D., Inc. ("WDD") alleged that its civil rights were violated in connection with certain land use restrictions imposed by a municipality. Appellants Thornbury Township and John G. Copeland, Jr. appeal the denial of their motion for reconsideration of the denial of summary judgment in their favor. For reasons stated below, we will dismiss the Township's appeal for lack of appellate jurisdiction, and reverse the denial of summary judgment with regard to appellant Copeland.

I. BACKGROUND

2. This dispute arose over a proposed subdivision of WDD's 164-acre tract of land located in Thornbury Township, and appellant Copeland's consistent opposition to that proposal. On October 7, 1985, WDD submitted to the Thornbury Township Board of Supervisors ("the Board"), as well as to the Township's Planning Commission ("the Commission"), a preliminary subdivision plan. At that time, the members of the Board were Wayne Gersen, Ben Johnson and Theodore Pauley. Copeland was then a member of the Commission; he did not take office as a Supervisor until January 6, 1986, at which time he replaced Supervisor Gersen.

3. The Commission, a strictly advisory board, reviewed WDD's plan, and prepared a report which outlined numerous deficiencies and recommended disapproval by the Board. The report was signed by all members of the Commission, including Copeland, who was then its Chairman. The Board of Supervisors then reviewed the preliminary plan and on December 19, 1985, recommended that certain changes be made. WDD consequently revised the plan to incorporate the Board's recommendations.

4. On December 30, 1985, WDD appeared at a public meeting of the Board with the modified plan. Supervisors Pauley and Johnson expressed support for the modified plan, and Supervisor Gersen reserved comment because he was soon to leave office. The Board suggested that WDD apply to the Thornbury Township Zoning Hearing Board for variances required due to the modified plan's non-conformance with the township's land development ordinances. WDD filed such an application on January 9, 1986.

5. The Zoning Hearing Board held a hearing on the WDD application on February 20, 1986. Supervisors Pauley and Johnson testified in support of the application. Supervisor Copeland appeared through counsel at the hearing, and opposed the application. Copeland's counsel stated that he was appearing for Copeland as an individual resident. The Zoning Hearing Board granted the application on April 3, 1986, notwithstanding Copeland's opposition. Several weeks later, on May 5, 1986, Irl and Lois Duling, property owners in Thornbury, filed an appeal from the decision of the Zoning Hearing Board with the Chester County Court of Common Pleas.

6. On April 22, 1986, Copeland sent a letter to WDD advising that the Board had not approved the plan. At that time however, the Board had not yet taken

any formal action at a public meeting with respect to the plan. The Board's formal action did not come until it held a special meeting on May 21, 1986. At that meeting the Board voted, pursuant to 53 P.S. § 10908(3), to intervene in the Duling's appeal of the Zoning Hearing Board's grant of variances. The Board also at that meeting formally voted to deny the subdivision plan. Both decisions were passed by a 2-1 vote, with Supervisors Copeland and John C. Budzinski[1] in the majority, and Supervisor Pauley, who had consistently supported WDD, dissenting.

7. The day after the meeting, WDD commenced an action in the Court of Common Pleas, seeking to force the Township to approve its original plan. On June 13, 1986, the court decided that because the township had not acted on the plan within the time prescribed by 53 P.S. § 10508, the Board must "approve [the original] plan in terms as submitted." Appendix at 270.

8. While the dispute between WDD and the township continued to wind its way through the state courts for another year after this ruling,[2] it was at this

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1. Budzinski had replaced Johnson as a Supervisor on May 15, 1986. After earlier opposing WDD before the Zoning Hearing Board, Budzinski was nominated as Johnson's replacement by Supervisor Copeland.

2. Following the ruling of June 13, 1986, WDD submitted a final subdivision plan to the Township on July 7, 1986. The plan was considered at a Board meeting on September 8, 1986, at which WDD and Supervisor Pauley both requested Copeland not to vote in the matter. Copeland refused. By letter of September 15, 1986, the Board notified WDD that its plan had been approved, subject to thirty-eight conditions. WDD, contending that these conditions were so onerous as to constitute a denial of the plan, appealed the decision to the Chester County Court of Common Pleas. On July 13, 1987, the court, sitting en banc, decided that Copeland should not have voted, and that his behavior throughout the entire affair had been "uniquely egregious." The court therefore disqualified

point that the instant matter entered the federal court. WDD filed a complaint in state court against the Township and Copeland, alleging violations of 42 U.S.C. § 1983, on June 18, 1986; the defendants then removed the case to the District Court, and later moved for summary judgment. The motion was denied as to both defendants on March 19, 1987.

9. Following the denial of the motion, the defendants filed both a motion for reconsideration in the District Court on March 30, 1987, and a notice of appeal to this court on April 10, 1987. Apparently because the appellants had different trial and appellate counsel, neither court was aware of the fact that both proceedings were pending at the same time. This court dismissed the appeal on May 13, 1987. Appellants sought a clarification of the dismissal of the appeal, and on May 28, 1987, this court announced that it had dismissed the appeal because there was a factual issue remaining as to Copeland's immunity from suit. Appendix at 427. Thereafter, the District Court denied the motion for reconsideration on June 23, 1987. This appeal of the denial of reconsideration followed.

II. APPEAL OF THORNBURY TOWNSHIP

10. Generally, 28 U.S.C. § 1291 does not give this court jurisdiction to consider the denial of a motion for summary judgment. *Metex Corp. v. ACS Industries, Inc.*, 748 F.2d 150, 153 (3d Cir. 1984); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453 U.S. 913 (1981). As discussed below in Part III, there is an exception to this rule when the appeal centers on the denial of a claim of immunity. Appellant Thornbury Township, however, does not claim immunity from

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Copeland from further participation, and remanded to the Board for another vote on the plan. The parties have not informed this court of any further proceedings in this underlying matter.

suit. Its entire argument, both in the District Court and on appeal to this court, is that under the applicable law of § 1983 claims it is entitled to summary judgment.[3] Since there has been no final judgment in this case, and since the township does not raise a claim of immunity, this court has no jurisdiction to decide whether the District Court properly denied the motion to reconsider its denial of summary judgment.

III. APPEAL OF SUPERVISOR COPELAND

11. Unlike WDD, appellant Copeland does raise an issue which is appealable at this point. Pursuant to 28 U.S.C. § 1291, a party may appeal to this court before the entry of a final judgment if the District Court has made a "collateral order" which is effectively a final determination of the party's rights on a particular issue. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Under this collateral order doctrine, a public official claiming qualified immunity from suit may appeal a denial of summary judgment, where there are no disputes of fact material to the official's qualified immunity claim. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); *Chinchello v. Fenton*, 805 F.2d 126, 129 (3d Cir. 1986). The sole issue that

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3. As a municipal corporation, the Township, of course, cannot make a claim of immunity under the law governing § 1983 suits. *See Owen v. City of Independence*, 445 U.S. 622, 635 (1980). This court recently decided that that rule was not affected by the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See Hynson By and Through Hynson v. City of Chester*, 827 F 2d 932, 934 (3d Cir. 1987), *cert. denied sub nom. Delaware Cty. Prison Bd. v. Hynson*, 56 U.S.L.W. 3460 (1988). Thus, even if Thornbury Township did claim immunity, this court would have to affirm the denial of the motion for reconsideration, and the result would be the same: the Township could not avoid further proceedings in this case.

may be raised on appeal in such a case is whether the official's conduct violated a legal norm which was clearly established at the time of the allegedly illegal conduct; this is a "purely legal" question, and this court has plenary review. *Mitchell*, 472 U.S. at 528 & n.9; *Chinchello*, 805 F.2d at 130-31.

12. The question for this court, then, is whether Copeland violated any right of WDD's which was clearly established at the time of the alleged violation. Review of this question in this court must begin with an identification of the right which WDD claims was violated by Copeland, and whether that right was clearly established at the time of the acts at issue. If WDD had no clearly established right, then Copeland is immune from suit and is entitled to summary judgment. If there was a clearly established right, the next question is whether Copeland in fact violated WDD's rights and whether Copeland "knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

13. Because WDD does not effectively allege any connection between Copeland's actions and the violation of any clearly established right, this court will reverse and remand for an entry of summary judgment in favor of Copeland; there seems to be no need to resolve the second question described above by having a full trial.[4] WDD alleges that Copeland used his

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4. It is this latter question which the prior appellate decision in this case addressed. We do not now suggest any disagreement with the prior panel's dismissal of the appeal of the District Court's decision that there are genuine issues of material fact as to Copeland's state of mind when he acted with respect to WDD's

position as Supervisor of Thornbury Township to intimidate, harass, and conspire with other township officials to deprive WDD of its constitutional right to have its plans heard by a fair and impartial tribunal. Appellants argue, conversely, that since Supervisor Copeland was authorized to vote on land development proposals, his opposition to WDD's land development plan was a proper exercise of his discretion.

14. The question comes down to the nature of WDD's right to receive a hearing before a "fair and impartial tribunal." WDD is quite correct in contending that it does have such a right. However, its later contention, that a tribunal with a member "personally interested" is not impartial, is irrelevant because WDD makes no claim whatsoever that Copeland is or was personally interested. At the most it claims that Copeland was "strongly opposed" to WDD's plan, but it makes no allegation that this opposition was due to personal interest. For all that WDD has told the court, Copeland may simply be strongly opposed to the plan because he believes it not to be in the township's best interests. Opposition to a plan by a Board member, however, is not violative of due process; it is entirely proper for members of such legislative bodies to have strong opinions about the matters before them. And because it appears that Copeland was within his legal rights in voting to join the Duling appeal, WDD has failed to show that Copeland's actions could have violated any clearly established right.[5] Consequently, Copeland is immune to suit and should be granted summary judgment.

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subdivision plan. We merely note that it is unnecessary to decide the question, because WDD has not alleged any clearly established right that could have been violated by Copeland's actions.

5. It is true that the Chester County Court of Common Pleas has noted the "uniquely egregious comportment of Supervisor Copeland in the circumstances surrounding this case," and has

CONCLUSION

15. Thornbury Township has no basis for an appeal at this point in the proceedings. Lacking jurisdiction, this court must therefore dismiss the Township's appeal. Under the collateral order doctrine, however, appellant Copeland may appeal the denial of summary judgment. Because the acts of which WDD complains do not show the violation of any clearly established right, Copeland is immune from suit. The decision of the District Court denying reconsideration of the denial of summary judgment will thus be reversed as to Copeland, and the case remanded for an entry of summary judgment in his favor.

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also described the Board's consideration of WDD's plan as being of a "quasi-judicial" nature. *See WDD, Inc. v. Thornbury Township Board of Supervisors*, No. 86-07758 (order of July 13, 1987), reprinted in Appellee's Brief, Exhibit B. These characterizations of Copeland's actions and of the Board's cannot, however, control this case. As noted above, the relevant question is whether Copeland knew or reasonably should have known at the time of his actions that he was violating a clearly established right. A later judicial determination about the propriety of Copeland's actions can have no bearing on this limited inquiry.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

IN THE
United States District Court
FOR THE
Eastern District of Pennsylvania

W.D.D., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
THORNBURY TOWNSHIP,	:	
CHESTER COUNTY and	:	
JOHN G. COPELAND, JR.	:	NO. 86-3972

MEMORANDUM AND ORDER

KELLY, J. June 23, 1987

Defendants, Thornbury Township (Township) and John G. Copeland, Jr. (Copeland) have moved, pursuant to Fed. R. Civ. P. 60(b), for reconsideration of this court's order of March 19, 1987. In that order I denied defendants' motion for summary judgment.[1]

Defendant Township moved for summary judgment arguing that the claims against it were untimely under *MacDonald, Sommer, & Frates v. Yolo City*, 106 S. Ct. 2561 (1986). The Township argued that since the zoning review process was incomplete, it was impossible for this court to determine what damages plaintiff may incur when final zoning decisions were rendered. I found this argument to be meritless since "[d]efendants' reliance on *MacDonald* [was] . . . misplaced. *MacDonald,* involved an alleged taking of property" while "[p]laintiff . . . alleged a § 1983 civil rights violation." *W.D.D., Inc. v. Thornbury Township and John*

1. In my Order dated March 19, 1987 I discussed the factual history of this case. I will not now rehash these facts.

G. Copeland, Jr., C.A. No. 86-3972, slip op. at 5 (March 19, 1987).

Defendant Copeland moved for summary judgment arguing that the claims against him in his individual capacity should be dismissed since he was immune from the imposition of the relief sought[2] under *Mitchell v. Forsythe*, 105 S. Ct. 2806 (1985). In *Mitchell*, the Supreme Court stated "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2818. I found defendant Copeland's argument for summary judgment to be meritless since "a genuine issue exist[ed] as to the material fact of whether defendant Copeland violated the constitutional rights of the plaintiff and whether or not he should have known his actions were in violation of these rights." *W.D.D., Inc. v. Thornbury Township and John G. Copeland, Jr.*, C.A. No. 86-3972, slip op. at 6 (March 19, 1987).

Defendants have now moved for reconsideration, reasserting some of these arguments and offering new arguments which they allege require the summary dismissal of the claims against them.

I. *The Standards for Summary Judgment*

Rule 56(c) instructs a district court to enter summary judgment when the record reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This rule provides the court with a useful tool when the critical facts are undisputed, facilitating the resolution of a pending controversy without the expense and delay of conducting a trial made unnecessary by the absence of factual dispute. *Peter-*

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2. Defendant Copeland argued that the claims against him in his official capacity merged with the claims against the Township and should be dismissed in light of the *MacDonald* decision.

son v. Lehigh Valley Dist. Council, United Brotherhood of Carpenters & Joiners, 676 F.2d 81, 84 (3d Cir. 1982); *Goodman v. Mead Johnson & Co.,* 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). Disposing of a matter by summary judgment is inappropriate, however, where the evidence before the court reveals a genuine factual disagreement requiring submission to a jury. "[E]ven if the preponderance of the evidence should appear to lie on the moving party's side, the court's function is not to decide issues of fact, but only to determine whether any issue of fact exists to be tried." *Ness v. Marshall,* 660 F.2d 517, 519 (3d Cir. 1981). Where a factual disagreement exists, a trial is necessary to resolve the conflict. *Peterson,* 676 F.2d at 84.

In petitioning for summary judgment, the moving party bears the burden of identifying for the district court those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* U.S. , , 106 S. Ct. 2548, 2553 (1986). Following such a showing, the burden then shifts to the nonmoving party who must present affirmative evidence from which a jury might reasonably return a verdict in his favor. *Id.* at 2553-54; Anderson, 106 S. Ct. at 2514; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. , 106 S. Ct. 1348 (1986). In making its ruling, the court must view all inferences in the light most favorable to the nonmoving party, *Continental Ins. Co. v. Bodie,* 682 F.2d 436, (3d Cir. 1982), must revolve all doubts against the moving party, *Hollinger v. Wagner Mining Equip. Co.,* 667 F.2d 402, 405 (3d Cir. 1981), and must take as true all allegations of the nonmoving party which conflict with those of the movant, *Anderson,* 106 S. Ct. at 2513.

II. *Plaintiff's Fifth Amendment Claims*

Plaintiff makes numerous allegations that defendants have violated its rights under the Fifth Amendment. Complaint at ¶¶ 34, 41, 45, 48 and 54. Defendants argue that "[g]iven the circumstances of the instant action, the only

Fifth Amendment right to which plaintiff could conceivably be referring in its Complaint is the protection against 'taking' of property without just compensation." Memorandum of Law in Support of Defendants' Motion for Reconsideration at 21. Defendants conclude that plaintiff's claims arising under the Fifth Amendment must be dismissed since plaintiff has admitted that "[t]he case at bar does not make a claim of an alleged 'taking' of property without just compensation. . . ." *Id.* This argument is meritless.

Plaintiff, in its complaint, does *not* allege that its property has been taken without just compensation. Rather, plaintiff alleges that it has been intimidated, harassed and interfered with in violation of the Fifth and Fourteenth Amendment rights to substantive and procedural due process of law. Complaint at 10.

III. *Plaintiff's Section 1983 Claim Against the Township*

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Supreme Court determined that "a local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. The Supreme Court in the case *In Re Murcheson*, 349 U.S. 133 (1955), held that the right to due process included the right to proceed before an impartial tribunal. More specifically, the Court held that "a fair trial *in a fair tribunal is a basic requirement of due process. . . .*" *Id.* at 136 (emphasis added).

Defendants argue that:

> plaintiff is unable to adduce any affirmative evidence that defendant Township had a 'policy', the implementation of which denied plaintiff of procedural and substantive due process. To the contrary, the facts clearly indicate that neither the ordinance nor the application thereof were constitutionally deficient.

Memorandum of Law in Support of Defendant's Motion for Reconsideration at 29.

Plaintiff, in its complaint, alleged, *inter alia*, that the actions by the Township "constitute a continuing illegal policy of intimidation, harassment and *undue interference* under color of law and authority, the purpose of which is to deny Plaintiff procedural and substantive due process in direct contravention of Plaintiff's rights secured by the Fifth and Fourteenth Amendments. . . ." Complaint at 10 (emphasis added). To support this allegation of official abuse of process and in response to defendants' motion for summary judgment plaintiff submitted the following facts: (1) the Township Supervisors withdrew support for plaintiff's preliminary subdivision plan after plaintiff modified the plan in reliance on the Township Supervisors' indication that they would support the plan if the changes were made; (2) the Township Supervisors, after failing to deny plaintiff's preliminary subdivision plan, supported the appeal of Irl and Lois Duling to the Chester County Court of Common Pleas seeking a reversal of the zoning board's approval of plaintiff's variances, after the Township had supported the variances at the zoning hearing.

Defendants, in the motion for summary judgment or for reconsideration, do not deny these facts; instead, they argue that these facts do not establish a policy of official abuse or interference by the Township. Plaintiff, however, for purposes of defending against a motion for summary judgement need not establish that a policy or custom existed but needs to show merely that a question exists as to the existence of a policy or custom of intimidation, harassment and interference. I find that the facts proffered by the plaintiff viewed in the light most favorable to the plaintiff support a finding of a policy of intimidation, harassment, and interference making summary judgment improper on this claim.

IV. *Plaintiff's Section 1983 Claim Against Defendant Copeland*

Defendants allege that plaintiff's section 1983 claim against defendant Copeland should be dismissed since: (1) "plaintiff has no constitutional property or liberty right to develop land in violation of Thornbury Township's constitutionally sound zoning and subdivision ordinances," Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 32, and (2) since the actions of defendant Copeland in opposing the plaintiff's subdivision plan were neither arbitrary nor capricious.

Defendants' first argument for summary judgment against defendant Copeland is without merit. Plaintiff is not alleging that it has a constitutional right to violate Thornbury Township's zoning code. Plaintiff is alleging, *inter alia,* that defendant Copeland intimidated, harassed and interfered with Plaintiff's land use plans denying plaintiff's constitutional right to an impartial adjudication of its land use plans.

Plaintiff, in its complaint, alleged that "[d]efendant Copeland acting under color of law and office has arbitrarily and capriciously disregarded the constitutional rights of Plaintiff secured by the Fifth and Fourteenth Amendments of the Constitution. . . ." Complaint at 15. To support this allegation and in response to defendants' motion for summary judgment, plaintiff offered the following facts: (1) defendant Copeland participated in the vote on plaintiff's application for land use controls after appearing by counsel, in an individual capacity, in opposition to the variance before the Zoning Board; (2) defendant Copeland introduced and voted in favor of a resolution, adopted by the Township to intervene on behalf of the Duling's in their appeal of the Zoning Board's approval of plaintiff's variances; (3) defendant Copeland wrote a letter to plaintiff's counsel incorrectly informing him that the Township had denied plaintiff's application; and (4) defendant Copeland used his position

as a Supervisor to deprive plaintiff of information regarding plaintiff's application.

Defendants do not argue that these facts are untrue,[3] but instead argue that they "support the fact that his [defendant Copeland] opposition to W.D.D.'s subdivision application was not arbitrary, inconsistent or in any way biased." Memorandum of Law in Support of Defendants' Motion for Reconsideration at 33. These facts, when interpreted by the defendant, may not support plaintiff's claim of intimidation, harassment and interference. However, when viewed in the light most favorable to the plaintiff they do present a question of material fact as to the propriety of defendants' actions. Therefore, summary judgment is improper on this claim.

V. *Collateral Estoppel and Plaintiff's Claims Against Defendant Copeland*

Defendants argue that "it is clear that plaintiff herein is precluded from pursuing his claims against Supervisor Copeland in Federal Court as a result of Judge Gawthrup's dismissal of plaintiff's Complaint in Mandamus and denial of plaintiff's Motion for Peremptory Judgment." Memorandum in Support of Defendants' Motion for Reconsideration at 41.

For collateral estoppel to be proper it must be established that:

> 1) *the issue decided in the prior adjudication was identical with the one presented in the later action,* 2) there was a final judgment on the merits, 3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and 4) the party against whom the plea is

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3. Defendant submitted the affidavit of defendant Copeland in which he avers that he appeared in his capacity as a Supervisor at the zoning hearing and not as an individual. Defendant does not deny, however, that his counsel did in fact state at the zoning hearing that he was appearing on behalf of the defendant in his individual capacity.

> asserted has had a full and fair opportunity to litigate the issue in question in a prior action.

Public Service Mutual Insurance Company v. Cohen, 616 F.2d 704 (3d Cir. 1980) (emphasis added.)

The issue before Judge Gawgthrup was as he stated "whether Supervisor Copeland's actions were so demonstrative of a conflict of interest on his part as to disqualify his vote of September 8, 1986. . . ." Exhibit "J" at 5 attached to Defendants' Motion for Reconsideration. The issue before this court is, *inter alia*, whether defendant Copeland intimidated, or harassed the plaintiff or interfered with plaintiff's constitutional rights as protected under 42 U.S.C. § 1983. Since these issues are not identical, plaintiff is not collaterally estopped from bringing this section 1983 claim against defendant Copeland in this court.

An order follows.

APPENDIX D

IN THE
United States District Court
FOR THE
Eastern District of Pennsylvania

W.D.D., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
THORNBURY TOWNSHIP,	:	
CHESTER COUNTY and	:	
JOHN G. COPELAND, JR.	:	NO. 86-3972

MEMORANDUM AND ORDER

KELLY, J. March 19, 1987

Presently before this court is a motion for summary judgment filed by defendants, Thornbury Township (Township) and John G. Copeland, Jr. (Copeland) a township supervisor. Plaintiff, W.D.D., Inc. (WDD) has alleged that defendants, Township and Copeland, under color of state law, have denied plaintiff procedural and substantive due process and have interfered with plaintiff's right to freedom of enterprise by opposing plaintiff's attempts to obtain certain zoning variances in violation of 42 U.S.C. §1983. Complaint at 10, 13, 18 and 21. A brief review of the facts is necessary before reaching the merits of defendants' motion.

Plaintiff was the owner of a tract of land located in Thornbury Township, Chester County, Pennsylvania. On October 7, 1985, plaintiff filed a preliminary subdivision plan with defendant Township. On December 18, 1985, the Thornbury Township Board of Supervisors (Supervisors) met with the Township Engineer to discuss certain modifications to the plan. On December 19, 1985, plaintiff received the modifications recommended by the Supervisors and the

Engineer. The modified plan required plaintiff to obtain variances from the Thornbury Township Zoning Hearing Board (Zoning Board). On December 30, 1986, plaintiff appeared at a public meeting before the Supervisors and presented a modified subdivision plan which incorporated the engineer's and Supervisor's recommendations. Two of the three supervisors, Theodore R. Pauley and Benjamin C. Johnson, indicated that they would support the plan, as modified, when presented for review to the Zoning Board.[1] The Supervisors then directed plaintiff to appear before the Zoning Board to request the necessary variances. Complaint at 3, 4.

On February 20, 1986, plaintiff appeared before the Zoning Board. At this meeting, defendant Copeland, who had replaced Supervisor Gerson, opposed the variances.[2] The remaining supervisors, Pauley and Johnson, appeared in support of the plan and the requested variances. The Zoning Board granted the variances on April 3, 1986. One week later, on April 10, 1986, Supervisor Johnson resigned. Defendant Copeland then nominated John Budzinski to replace Johnson as Supervisor; Budzinski was approved on May 15, 1986.

On May 15, 1986, two property owners, Irl and Lois Duling, filed an appeal in the Court of Common Pleas of Chester County contesting the Zoning Board's decision to grant the variances. At a May 21, 1986 Supervisors' meeting, defendant Copeland moved to have the Township join in the appeal to oppose the variances notwithstanding the Supervisors' previous position in support of the plan. Defendant Copeland also moved to deny the Subdivision plan. Copeland and Budzinski then passed the motion over Supervisor Pauley's objection.

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1. The third Supervisor, Wayne M. Gerson, refused to express his option because his term as Supervisor was to expire on 12/31/85.

2. Plaintiff alleges that Copeland appeared in his individual, as opposed to his official, capacity.

On May 22, 1986, plaintiff filed a complaint in mandamus and motion for peremptory judgment against the Board of Supervisors in the Court of Common Pleas of Chester County. Plaintiff argued that because the Supervisors had not rendered a decision on the preliminary plan within 90 days as required by Pa. Stat. Ann. tit. 53, §10508(3) (Purdon 1972), the preliminary plan was deemed approved.

On June 13, 1986, Judge Gawthrup of the Court of Common Pleas of Chester County entered an order directing the Township to approve the preliminary plan as submitted. On July 7, 1986 plaintiff submitted a final plan to the Board. On September 8, 1986, the Board approved the final plan. Plaintiff, however, contends that the conditions attached to the plan were so onerous as to constitute a rejection of the plan.

A moving party is entitled to summary judgment if the party shows tha there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In examining the record, this court must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356-57 (1986) (*quoting United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). The moving party has the initial burden of identifying those portions of the record it feels demonstrate that there is no issue of material fact. *Celotex Corp. v. Cartrett*, 106 S.Ct. 2548, 2553 (1986). The nonmoving party must then come forth with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

1. *Defendant Thornbury Township*

Defendant Township argues that it is entitled to summary judgment because plaintiff has filed to state a claim upon which relief can be granted in accordance with *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561 (1986). Defendant argues tha the zoning review process is incomplete, thereby making it impossible for this

court to determine what damages, if any, plaintiff may incur when the final zoning decisions are made. In *MacDonald*, respondent, Yolo County's Planning Commission, rejected appellant's proposed subdivision plan on the ground that the plan did not conform to the county's zoning regulations. Appellants initiated a regulatory taking suit alleging that the rejection of their plan constituted a taking of property without just compensation. The Supreme Court held that an essential prerequisite to a regulatory takings claim was a "final and authoritative determination of the type and intensity of development legally permitted on the property." *Id.* at 2566. Defendant Township asserts that because the Duling's zoning appeal is not completed, there is no final and authoritative determination.

Defendant's reliance on *MacDonald* is, however, misplaced. *MacDonald*, involved an alleged taking of property. Plaintiff, WDD, however, has alleged a §1983 civil rights violation. Plaintiff is not attacking the regulations; rather, it is attacking the Township and Copeland's opposition to plaintiff's subdivision plan. This court has already held that plaintiff has established a §1983 cause of action against both defendants. *See W.D.D., Inc. v. Thornbury Township*, No. 86-3972, slip op. at 7 (Aug. 8, 1986) (Kelly, J.) (Rule 12(b)(6) motion denied because plaintiff established a §1983 claim).

I have held that the allegations of plaintiff's complaint were "sufficiently specific to apprise the defendants of the matter to which they must defend." *Id.* Defendant, in light of this court's prior decision, is aware of the nature of plaintiff's suit. Thus, defendant cannot rely on the *MacDonald* decision, a regulatory taking claim, to defeat what this court has already labeled a cognizable §1983 claim. Therefore, I conclude that defendant Township has filed to demonstrate that it is entitled to summary judgment.

2. *Defendant Copeland*

Defendant Copeland argues that he is entitled to sum-

mary judgment on the ground that, as a government official performing a discretionary function, he is immune from liability under §1983. Defendant's argument is based primarily upon the Supreme Court's recent decision in *Mitchell v. Forsyth*, 105 S.Ct. 2806 (1985). In *Mitchell*, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages *insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.*" *Id.* at 818 (emphasis added). Government officials, when performing discretionary duties, while generally immune from liability, may not exercise unfettered discretion in carrying out these duties. Government officials must hesitate and evaluate whether their conduct is infringing upon constitutional rights. *Id.*

As noted above, plaintiff has alleged that defendant Copeland violated its right to freedom of enterprise and denied it procedural and substantive due process. I find that a genuine issue exists as to the material fact of whether defendant Copeland violated the constitutional rights of the plaintiff and whether or not he should have known his actions were in violation of these rights. Therefore, defendant Copeland is not entitled to summary judgment.

An order follows.

APPENDIX E

IN THE
United States District Court
FOR THE
Eastern District of Pennsylvania

W.D.D., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
THORNBURY TOWNSHIP,	:	
CHESTER COUNTY and	:	
JOHN G. COPELAND, JR.	:	NO. 86-3972

MEMORANDUM AND ORDER

KELLY, J. August 8, 1986

Presently before this court is defendants Thornbury Township (Township) and John G. Copeland, Jr.'s (Copeland) motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) or in the alternative, a motion for a more definite statement pursuant to Fed. R. Civ. P. 12(e).

Plaintiff in its complaint alleges that: it has been denied approval of its subdivision plan by the Township and that the activities of the Township and Copeland have been to subvert the development of plaintiff's property, by way of opposing, *inter alia,* plaintiff's efforts to obtain a variance from the zoning hearing board after the township had assured plaintiff it would support its efforts in obtaining a variance.

Specifically plaintiff has alleged that it first sought approval of its subdivision plan from the Township in early December of 1985. On December 19, 1985 the Supervisors of the Township (Theodore Pauley, Benjamin Johnson and Wayne M. Gerson) with the assistance of the Township engineer presented the proposed plan with recommended changes by the Board of Township Supervisors to plaintiff.

The plan as recommended by the Township Supervisors required plaintiff to obtain a zoning variance from the Zoning Hearing Board.[1] On December 30, 1985 plaintiff appeared at a public meeting before the Township Board of Supervisors. At this public meeting plaintiff prepared a modified subdivision plan which in effect incorporated the Township Supervisors' recommendations. The Board of Township Supervisors endorsed the plan[2] and two of the three Supervisors (Theodore Pauley and Benjamin Johnson) expressed that they would support the plan when it sought review by the Zoning Hearing Board. The third Supervisor (Wayne Gerson) abstained from expressing his view since his term was to expire at the end of the year. On February 20, 1986 the Zoning Hearing Board conducted a hearing concerning plaintiff's request for a variance. At this hearing defendant Copeland who had taken office as a Township Supervisor in January 1986, replacing Wayne Gerson, made an appearance through counsel. Copeland opposed the granting of the variance. At this zoning hearing Township Supervisors Theodore Pauley and Benjamin Johnson appeared and testified in support of the subdivision plan and the granting of the variance. On April 3, 1986 the Zoning Hearing Board granted plaintiff's variance. On April 10, 1986 Township Supervisor Benjamin Johnson resigned. On April 22, 1986 plaintiff received a letter delivered by a Township police officer from defendant Copeland. The letter advised plaintiff that the time limit on acting on plaintiff's subdivision plan had expired and that the plan had not been approved. It is alleged that there had been no action taken by the governing body of the Township at a public meeting.

On May 5, 1986 two property owners in the Township filed an appeal in the Court of Common Pleas from the

---

1. It should be noted here that the original plan it is alleged did not require a zoning variance.

2. I note the minutes of the meeting which are attached to the complaint, suggest that plaintiff was not requesting a definite decision but rather they want to know the "position of the supervisors."

approval of the variance by the Zoning Hearing Board. On May 15, Copeland nominated John Budzinski (Budzinski) to replace Benjamin Johnson as a Township Supervisor. Budzinski had made an appearance in opposition to the granting of the variance at the February 20, 1986 Zoning Hearing.[3] Budzinski was approved as a Supervisor of the Township at the May 15, 1986 meeting. On May 21, 1986 defendant Copeland made a motion at a public meeting to have the Township intervene in the appeal of the decision of the Zoning Hearing Board which granted the variance, (opposing the Zoning Hearing Board's decision) notwithstanding the Township's prior position recommending the subdivision plan to the Zoning Hearing Board. Budzinski and Copeland passed the motion to intervene over the opposition of Supervisor Theodore Pauley. Also at the May 21, 1986 Township meeting Copeland made a motion to deny plaintiff's subdivision plan, notwithstanding Copeland's letter of April 22, 1986 which stated that the time limit for consideration of the plan had expired and that the plan was not approved. Again Copeland and Budziniski over Theodore Pauley's dissent passed the motion denying approval of plaintiff's subdivision plan.

The standard for reviewing a motion to dismiss for failure to state a claim was clearly set forth in *Viola v. Bensalem Township*, No. 84-3184, slip op. 2 (E.D. Pa. February 19, 1986) where the court held: "On a motion to dismiss for failure to state a claim the court must view the pleadings in a light most favorable to the nonmoving party. Thus, the court must view all allegations of fact most favorable to the nonmoving party."

---

3. I note that Budzinski at the Zoning Hearing stated "I am from the Thornbury Township Planning Commission." See Exhibit B of the Complaint.

As I view plaintiff's claim the purported approval by the Township Supervisors of a recommended[4] plan on December 30, 1985 was an "informal approval" made to give direction to plaintiff. Indeed since the subdivision plan required a zoning variance the Township Supervisors were unable to grant formal approval. Nevertheless, in light of the present motion to dismiss, I will consider for the instant motion that the Township had instructed plaintiff that it would support the plan before the Zoning Hearing Board, and would if a variance was granted approve the plan.

At the Zoning Hearing, defendant Copeland a newly elected member of the Board of Township Supervisors, made an appearance in opposition to granting the variance. Copeland was not a township supervisor at the time the Board of Township Supervisors gave plaintiff its word[5] that it would support the plan at the Zoning Hearing. More important is the fact that it is not alleged, nor does the partial transcript furnished the court (Exhibit B of the Complaint) of the proceeding before the Zoning Hearing Board, reveal that Copeland was acting beyond his capacity as an interested citizen. Certainly an elected official does lose his First Amendment rights to speak out on public issues what may effect him personally. Copeland's position before the Zoning Hearing Board did not adversely effect or even damage plaintiff. The two remaining members of the Township Board of Supervisors testified at the Zoning Hearing. The outcome of the Zoning Hearing was favorable to plaintiff. Indeed the petition for the zoning variance was granted.

---

4. Certain recommended changes to the original subdivision plan were made by the Township to plaintiff earlier in December. On December 30, the plaintiff incorporating their recommendations into its subdivision plan submitted it to the Township.

5. I note that of the three Township Supervisors, two gave the indication that they would support the plan at the Zoning Hearing while one abstained due to termination of his tenure as officer as of the first of January, 1986.

The letter which Copeland as Chairman of the Board of Township Supervisors allegedly authored and sent to plaintiff stated the following:

> The 195 days for consideration of the preliminary plan of subdivision for Fair Acres expires today. The 195 days total is arrived at by the MPC requirement of 90 days plus extension of 30 days, 30 days and 45 days by you.
>
> We do not approve of the plan as submitted.

Exhibit "C" of the Complaint.

This was sent after the variance was granted. As I understand it the subdivision plan after the zoning variance was approved became ripe for action by the Board of Township Supervisors. This letter stated that the period for consideration had expired and that the Township did not approve of the plan. Plaintiff asserts that there was no public meeting at which this denial of the subdivision plan was determined. Subsequent to this letter another member of the Board of Township Supervisors resigned and was replaced by John Budzinski, who had made his opinion known at the Zoning Hearing that he opposed the subdivision plan. At the public meeting in May of 1986 the Board of Supervisors passed on a "two to one" vote a motion rejecting plaintiff's subdivision plan. At the same meeting the Board of Township Supervisors passed a motion to intervene (opposing the granting of the variance) in certain private citizens' appeal of the decision of the Zoning Hearing Board granting the zoning variance to plaintiff. Plaintiff argues that it has been harassed and intimidated by defendants' activities and its due process rights have been violated. Examining this matter most favorably to plaintiff, I see a commitment/promise made by the Township in December 1985. Plaintiff acted to its detriment and in reasonable reliance to the promise of the Board of Township Supervisors. Subsequently after the plaintiff had expended time and money securing the zoning variance the Board of Township Supervisors breached their earlier promise thus injuring plaintiff.

Plaintiff brought this action in state court seeking relief under Title 42 U.S.C. § 1983 which states in part:

> §1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The action which was brought in State Court was removed to this court by defendants. Plaintiff here has been afforded the proper forums to obtain the relief it seeks. They have not suggested that the Zoning Hearing Board was impermissibly bias. Rather plaintiff argues that the testimony presented was unfair because defendant Copeland opposed the granting of the variance and that the Township had an "agreement" to support plaintiff's efforts in securing a variance. The variance was granted.

Plaintiff's concurrent position is that the Board of Township Supervisors are bias and predisposed against its plan. The Board of Township Supervisors is a legislative body. Although at times it may be required to act as a quasi-judicial body. Notwithstanding, it may have a right to exercise discretion in approving or denying an application for a subdivision plan. However this discretion must be exercised fairly, the Board of Township Supervisors cannot be motivated by a Constitutional impermissible reason in exercising its discretion. *Blodgett v. County of Santa Cruz,* 553 F.Supp. 1090 (N.D. Calif. 1981) aff'd 698 F.2d (9th Cir. 1982). To this extent plaintiff has stated a cause of action against the Township and defendant Copeland. *See Shelton v. City of College Station,* 754 F.2d 1251 (5th Cir. 1985) (arbitrary and discriminatory action of zoning board in denying plaintiffs' application for variance states civil rights cause of action).

The fact that both Copeland and Budzinski had strong public feeling opposing plaintiff's plan, they may have decided the merits of denying the subdivision plan in May 1986 by considering material that was not presented at the hearing. Indeed because of their public opposition to the plan these individuals may have been required to recuse themselves. At this juncture I do not comment on whether or not the sending of the letter by Copeland explaining the expiration of the time for consideration of the plan had expired. The procedure is unclear to the court as to whether or not plaintiff may have some notice (either actual or constructive) of when the consideration period would expire and the resultive effect of the expiration date. I also do not comment on the effect of the Township taking the affirmative position deciding to intervene on seeking the reversal of the Zoning Hearing Board's decision in granting the variance to plaintiff.

For all of the above reasons defendants' motion to dismiss for failure to state a claim must be denied. I find the allegation sufficiently specific to apprise defendants of the matter to which they must defend. *Frazier v. Southeastern Pennsylvania Transportation Authority,* 785 F.2d 65 (3d Cir. 1986). Accordingly I shall not grant defendants alternative relief seeking a more specific pleading.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1382

W.D.D., Inc.
v.
THORNBURY TOWNSHIP, CHESTER COUNTY
and JOHN G. COPELAND, JR.
Appellants

ORDER

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER,* *Circuit Judges*.

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that Opinion and Judgment of the court dated February 8, 1988 is hereby vacated, and that the Clerk of this court list the case for rehearing before the court in banc on May 10, 1988.

BY THE COURT,

Chief Judge

DATED: March 31, 1988

*As to panel rehearing only.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1204

W.D.D., Inc.
v.
THORNBURY TOWNSHIP, CHESTER COUNTY
and JOHN G. COPELAND, JR.
Appellants

(Civil No. 86-3972—E.D. of Pa.)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and GREENBERG, *Circuit Judges.*

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Circuit Judge

DATED: July 1, 1987

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1204

W.D.D., Inc.
v.
THORNBURY TOWNSHIP, CHESTER COUNTY, ET AL.,
Appellants

E.D.Pa. Civil 86-3972

Present: SEITZ, HIGGINBOTHAM and SLOVITER,
Circuit Judges.

Appellants' motion for clarification of this Court's order dated May 13, 1987.

Deputy Clerk 7-1092

Copy of this Court's docket entries attached.

O R D E R

Appellants' motion for clarification of this court's order of May 13, 1987, is granted.

The appeal was dismissed as premature because the district court found that material facts were in dispute as to Copeland's immunity defense.

BY THE COURT,

Circuit Judge

DATED: March 28, 1987

dt/cc: Charles W. Craven, Esq.
Maria Zulick, Esq.
Thomas A. Riley, Jr., Esq.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1204

W.D.D., Inc.
v.
THORNBURY TOWNSHIP, CHESTER COUNTY
and JOHN G. COPELAND, JR.
Appellants

E.D.Pa. Civil 86-3972

Present: SEITZ, HIGGINBOTHAM and SLOVITER,
Circuit Judges.

O R D E R

Ordered that the appeal is dismissed.

BY THE COURT,

_____
Circuit Judge

DATED: May 13, 1987

dt/cc: Charles W. Craven, Esq.
Maria Zulick, Esq.
Thomas A. Riley, Jr., Esq.

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-319

In The

Supreme Court of the United States

October Term, 1988

THORNBURY TOWNSHIP
and JOHN G. COPELAND, JR.,

Petitioners,

vs.

W.D.D., INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RILEY LAW ASSOCIATES, Ltd.
Thomas A. Riley, Jr., Esquire
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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Where on appeal from denial of a Motion for Summary Judgment a panel of the Court of Appeals had requested briefs on the issue of appellate jurisdiction and, subsequently, after consideration of the briefs, dismissed the appeal for lack of jurisdiction, was the Court of Appeals en banc correct in dismissing a second appeal – from the same District Court order that was the basis for the first appeal?

Was the Court of Appeals en banc correct in holding that the Petitioner Township was not entitled to argue that it was entitled to immunity from suit pursuant to 42 U.S.C. 1983, where the Petitioner Township failed to claim immunity from suit in its Motion for Summary Judgment to the District Court?

Should the Supreme Court conduct appellate review of a panel decision of the Third Circuit Court of Appeals which has been specifically vacated by that Court en banc?

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No. 88-319

In The

Supreme Court of the United States

October Term, 1988

THORNBURY TOWNSHIP
and JOHN G. COPELAND, JR.,

Petitioners,

vs.

W.D.D., INC.,

Respondent.

RESPONDENT W.D.D., INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OTHER OPINIONS

In addition to seeking relief pursuant to 42 U.S.C. §1983 for Petitioners' interference with their due process constitutional rights in the land development process, Respondent has been pursuing its land development approvals through the Pennsylvania state court system. Some of the findings and holdings in the state court decisions bear on the conduct of Thornbury Township and John G. Copeland, Jr., and the due process issues. Attached to the Appendix are the relevant opinions of both the Pennsylvania trial court (Appendix "A") and

appellate court (Appendix "B") which have had occasion to examine the activities and conduct of both Thornbury Township and John G. Copeland, Jr. in connection with Respondent's land development application.

STATEMENT OF THE CASE

On June 18, 1986, Respondent, W.D.D. Inc., filed a Complaint in Pennsylvania state court in the instant matter alleging that the Petitioners, Thornbury Township and John G. Copeland, Jr., under color of law, violated Respondent's civil rights by their continuing intimidation, harassment and interference with Respondent's attempt to obtain the requisite administrative approval to develop a 164-acre parcel of property in Thornbury Township, Chester County, Pennsylvania into two-acre single family lots. Petitioners removed the matter to Federal Court.

As both the District Court and Court of Appeals have recognized, Respondent does not assert that the Township's land use regulations are, in and of themselves, so stringent as to constitute a constitutional deprivation of property rights. Rather, Respondent claims that the actions of the Township governing body and John G. Copeland, Jr. in their handling of Respondent's land development application constituted an unbridled deprivation of Respondent's civil rights.

The factual allegations of Respondent's Complaint (which have virtually all been admitted in the Answer to the Complaint) portray a municipal governing body gone

awry, due in large part to the activities of one of its supervisors, John G. Copeland, Jr. The complained-of activities include *inter alia*:

1. The Township opposing Respondent's land development plan in court proceedings and elsewhere after the Township had directed Respondent to draft that very plan and had voted to support it. After Respondent made the changes to its land development plan, as directed by the Township, the Township, by and through the direction of John G. Copeland, Jr., who was personally opposed to the plan and who had been recently elected to the Board of Supervisors, began to take various actions to intimidate, harass and interfere with Respondent's ability to proceed with the very plan which the Township had earlier voted to support and upon which vote, Respondent had substantially relied to its detriment.

2. Township supervisor, John G. Copeland, Jr., using Township police in an act of intimidation and harassment in delivering written notice to the Respondent that the Township had denied its land development application when in fact no such action had ever been taken by the Township governing body.

3. Township supervisor, John G. Copeland, Jr., refusing to remove himself from participating in his quasi-judicial capacity as a Township supervisor sitting in judgment of Respondent's land development application when he had retained counsel in his individual capacity to oppose the application.

4. Petitioners refusing to make available or accessible information on Respondent's land development application to another Township supervisor who had consistently expressed his outrage at the Township's and John G. Copeland, Jr.'s handling of Respondent's land development application.

5. Petitioners voting to have the Township appear as a party in opposition to the numerous lawsuits and appeals which Respondent was forced to bring in state court to obtain land development approval of a plan which the Township itself had directed Respondent to draft and had earlier voted to support.

Given these allegations, both the District Court and Court of Appeals quite properly recognized Respondent's claim as one which did not challenge either Township or state land development regulations but rather the conduct of the Township governing body and one of its supervisors regarding their handling of Respondent's land development application.

As noted earlier, Respondent has been forced to bring numerous state court actions to seek approval of its land development plans. Both the state trial court and state appellate court which have had occasion to review the propriety of Petitioners' activities in connection with this matter, have commented respectively that Petitioner Copeland's conduct in this matter has been "uniquely egregious" (see Appendix "A") and that his conduct "evidenced a greater appearance of bias, if not actual bias, toward W.D.D.'s application for subdivision approval (than another case previously determined by

the same court in which substantial bias had been found.)" (See Appendix "B").

Petitioners in the instant Petition do not allege that their conduct as described by Respondent does not constitute a denial of Respondent's civil rights, but rather that the Court of Appeals made an improper determination regarding an issue of appellate jurisdiction.

After having lost their Motion for Summary Judgment in the District Court, Petitioners filed both a Motion for Reconsideration of said denial with the District Court as well as a Notice of Appeal to the Court of Appeals. The "first panel" of the Court of Appeals to address the appeal realized that there was a question of appellate jurisdiction in the case, and asked counsel for both parties to brief this particular issue. Petitioners' counsel argued vigorously that the Court of Appeals had jurisdiction to hear the appeal. The first panel of the Court of Appeals determined that it did not have jurisdiction to hear the appeal and dismissed Petitioners' appeal. (See Petitioners' Appendix, p. 36a). Petitioners then requested rehearing en banc of the first panel's decision but the request was denied. (See Petitioners' Appendix, p. 34a).

After the District Court denied Petitioners' Motion for Reconsideration, Petitioners then filed a second appeal with the Court of Appeals from the denial of the Motion for Reconsideration. The "second panel" of the Court of Appeals erroneously proceeded to consider Petitioners' appeal notwithstanding the first panel's determination that it lacked appellate jurisdiction to hear the matter. The second panel issued a decision pursuant to

Petitioners' second appeal on February 8, 1988. (See Petitioners' Appendix, p. 4a). However, when the Court of Appeals en banc realized the error of the second panel, it immediately vacated the second panel's decision on March 31, 1988 and ordered argument before the Court en banc. (See Appendix "C"). The Court of Appeals en banc, after oral argument, dismissed Petitioners' appeal. (See Petitioners' Appendix, p. 1a).

Now, in the instant appeal, Petitioners seek to have this Court review not only the issue of appellate jurisdiction, but also to make a *de novo* determination on issues which Petitioners failed to raise before the District Court in both their Motion for Summary Judgment and Motion for Reconsideration of the District Court's Order. The Petitioner Township attempts to have this Court reverse the holding of *Owen v. City of Independence*, 445 U.S. 622 (1980) regarding a municipal body's inability to raise a qualified immunity defense notwithstanding the fact that Petitioner failed to raise said defense in its Motion for Summary Judgment and subsequent Motion for Reconsideration before the District Court.

REASONS FOR DISALLOWANCE OF THE WRIT

1. The Petition for Writ of Certiorari of Thornbury Township and John G. Copeland, Jr. Should Be Denied Because Petitioners, In Contravention Of The "Law Of The Case" Doctrine, Sought Multiple Determinations By The Court Of Appeals On The Issue Of Appellate Jurisdiction.

Petitioners seek to have this Court review, and overturn, the en banc decision of the Court of Appeals dismissing Petitioners' appeal from the District Court's

decision denying the Petitioners' Motion for Summary Judgment. As the preceding sentence suggests, the procedural history of this case is convoluted, to say the least. It is convoluted because Petitioners, in contravention of the "law of the case" doctrine, sought multiple determinations by the Court of Appeals on the issue of appellate jurisdiction. Both appeals were brought from the same District Court Order – the denial of Petitioners' Motion for Summary Judgment.[1] After losing once on the issue of appellate jurisdiction before one panel, Petitioners filed a second Notice of Appeal that was considered by a second (but different) panel of the Court of Appeals. The second panel, contrary to the first panel, concluded that there was appellate jurisdiction. A request by Respondent for reconsideration by the Court of Appeals en banc led to an immediate vacation of the erroneous second panel decision and a rehearing en banc on the entire issue. (See Appendix "C").

After rehearing en banc, the Court of Appeal, then, correctly dismissed Petitioners' appeal.

Petitioners attempted to set forth the complex procedural history of this case in their Petition (pp. 4-7). Respondent believes, however, that this procedural history can be made more clear through the following chronology:

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[1] Petitioners acknowledge that their second appeal, though technically an appeal from the District Court's denial of their Motion for Reconsideration, should be treated as an appeal of the District Court's denial of their Motion for Summary Judgment. (See Pet. for Cert., pp. 8,9).

March 19, 1987	-	District Court denies Petitioners' Motion for Summary Judgment.
March 30, 1987	-	Petitioners file Motion for Reconsideration of District Court's denial of Defendants' Motion for Summary Judgment.
April 10, 1987	-	Petitioners file Notice of Appeal #1.
April 16, 1987	-	First panel (of Court of Appeals) asks parties for authority why District Court's March 19, 1987 Order denying Summary Judgment is appealable.
April 24, 1987	-	Petitioners submit letter brief to first panel on the issue of the appealability of the District Court's denial of their Motion for Summary Judgment.
April 27, 1987	-	Respondent submits letter brief to first panel on the issue of the appealability of the District Court's denial of Defendants' Motion for Summary Judgment.
May 13, 1987	-	First panel "dismisses" Petitioners' Appeal.
May 18, 1987	-	Petitioners request clarification of basis for first panel's "dismissal".
May 28, 1987	-	First panel issues clarification.
June 11, 1987	-	Petitioners' Petition for Rehearing En Banc of first panel's decision.
June 23, 1987	-	District Court denies Petitioners' Motion for Reconsideration of District Court's denial of their Motion for Summary Judgment (see March 30, 1987).

June 30, 1987	-	Petitioners file Notice of Appeal #2.
July 1, 1987	-	Court of Appeals denies Defendants' Petition for Rehearing En Banc of first panel's decision on Appeal #1.
February 8, 1988	-	Second panel reverses District Court's denial of Petitioner Copeland's Motion for Summary Judgment.
February 22, 1988	-	Respondent's Petition for Rehearing En Banc of second panel's decision.
March 31, 1988	-	Court of Appeals orders rehearing en banc and vacates second panel's decision.
June 28, 1988	-	Court of Appeals en banc dismisses Petitioners' appeal.

The preceding chronology indicates quite clearly that, contrary to the doctrine of the "law of the case", Petitioners sought "two bites at the apple" on the issue of appellate jurisdiction. On their first Notice of Appeal, Petitioners sought review of the District Court's denial of their Motion for Summary Judgment. The first panel asked the parties for authority on the issue of appealability. After briefing on this issue, the first panel *dismissed* the appeal.

In response to a request for clarification, the first panel stated that "the appeal was dismissed as premature because the district court found that material facts were in dispute as to Copeland's immunity defense." *It is clear that the first panel considered the issue of appellate jurisdiction and, having considered this issue, dismissed the first*

appeal. Petitioners then sought, but were denied, rehearing en banc of the first panel's decision.

It is at this point that Petitioners sought a second bite at the apple of appellate jurisdiction. Prior to filing their first Notice of Appeal, Petitioners had moved in the District Court for reconsideration of the District Court's denial of Petitioners' Motion for Summary Judgment. After the first panel dismissed Petitioners' first appeal, the District Court denied Petitioners' Motion for Reconsideration. Petitioners then filed a second Notice of Appeal, in which they sought review of the District Court's denial of their Motion for Reconsideration. This second appeal was assigned to a second (and different) panel of the Court of Appeals. Although Respondent argued to the second panel that the first panel had already concluded (in dismissing the first appeal) that the District Court's denial of the Petitioners' Motion for Summary Judgment was not appealable, the second panel nevertheless proceeded to re-examine the issue of appellate jurisdiction contrary to the doctrine of the "law of the case". The first panel's decision that appellate jurisdiction was lacking was never appealed by Petitioners to the Supreme Court of the United States.

Before the Court of Appeals en banc, Respondent argued again that the issue of appealability had been resolved by the first panel and that the Court of Appeals en banc should, under the doctrine of the "law of the case", conclude that the decision of the first panel governed the issue of appealability. The Court of Appeals en banc addressed the issue of appellate jurisdiction *de novo*, and held, as did the first panel, that the Petitioners' appeal of the District Court's denial of the Petitioners'

Motion for Summary Judgment should be dismissed for lack of appellate jurisdiction. *W.D.D., Inc. v. Thornbury Township and John G. Copeland, Jr.*, 839 F.2d 151 (3rd Cir. 1988) vacated en banc, 850 F.2d 170 (3d Cir. 1988).

From the substance of the Petitioners' argument, it appears that the Petitioners are addressing the question of whether the Court of Appeals en banc properly dismissed the second appeal under the "law of the case" doctrine. The Court of Appeals en banc did not, however, base its holding on "law of the case" doctrine, but rather considered *de novo* the issue of appellate jurisdiction.

Respondent argued before the Court en banc, and continues to believe that the Court en banc did not have to reach the merits of the issue of appellate jurisdiction and could have concluded that the first panel's decision dismissing the first appeal was the "law of the case" and that Petitioners, in filing the second appeal, were improperly (i.e., contrary to the doctrine of the "law of the case") seeking to have a second panel reconsider the decision of the first panel.

"Law of the case", as applied to the effect of previous decisions on the latter action of the Court rendering them in the same cases, expresses the practice of courts to refuse to reopen that which has already been decided. *King v. W. Virginia*, 216 U.S. 92 (1910). In the instant case, there is no doubt that the first panel considered the issue of appellate jurisdiction and decided that appellate jurisdiction was lacking. The first panel raised the issue of appellate jurisdiction and, after giving the parties an opportunity to submit briefs on this issue, *dismissed* the

appeal. The "law of the case" doctrine should be applied to the decision of the first panel because, if it were not, the Court would be extending an open invitation to multiple appeals on the same issue. All unsuccessful parties would be encouraged to do what the Petitioners have done in the present case. After losing on the motion in the District Court, the losing party could simultaneously file a motion for reconsideration in the District Court and a notice of appeal. If the party loses the appeal, it could simply resurrect the previously filed motion for reconsideration (held in suspension while the appeal was pending) and, upon denial of the motion for reconsideration, file a second appeal. Clearly, the Court does not wish to encourage such a practice. Since the filing of a motion for reconsideration of a denial of a motion for summary judgment does not suspend the time for filing a notice of appeal, it was incumbent upon Petitioners' counsel to file the first Notice of Appeal within thirty (30) days of the District Court's denial of their Motion for Summary Judgment. Respondent's point is, quite simply, that once Petitioners filed and prosecuted their appeal and received a determination that the District Court's denial of their Motion for Summary Judgment was not appealable, they could not then seek a *second* determination of that same issue by filing a second Notice of Appeal from the District Court's denial of their Motion for Reconsideration.

Petitioners' only response to this argument is that the decision of the first panel was a "nullity" under the reasoning of *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982). They argue that "because the first appeal was filed during the pendency of a timely

Rule 59 Motion, the first appeal was a nullity, and its filing and disposition could have no effect on the second appeal." (Pet. for Cert., pp. 9-10).

Petitioners misread *Griggs* and Federal Rule of Appellate Procedure 4(a)(4) which *Griggs* interprets. Rule 4(a)(4) provides as follows:

> If a timely Motion under the Federal Rules of Civil Procedure is filed in the District Court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of judgment would be required if the Motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such Motion. A Notice of Appeal filed before the disposition of any of the above Motions shall have no effect. A new Notice of Appeal must be filed within the prescribed time measured from the entry of the order disposing of the Motion as provided above. No additional fees shall be required for such filing.

In *Griggs*, a District Court, after granting a motion for summary judgment, entered judgment in favor of the moving party. Thereafter, the losing party filed a timely motion to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. While this motion was still pending, the losing party filed a notice of appeal. Thereafter, the District Court denied the losing party's Rule 59 motion. The United States Court of Appeals for the Third Circuit accepted appellate jurisdiction based upon the notice of appeal filed while the Rule 59 Motion was still pending. This Court concluded that the Court of Appeals had erred in that, under Federal

Rule of Appellate Procedure 4(a)(4), "a Notice of Appeal filed before the disposition [of a Rule 59 Motion] shall have no effect."

Griggs and Rule 4(a)(4) have no bearing on the first appeal filed in this case. It is clear from the language of Rule 4(a)(4) that the Rule is limited to the effect of a notice of appeal that is filed while a *post-judgment* motion is pending. Indeed, the first sentence of the Advisory Committee's comments to the 1979 amendments that added subdivision (a)(4) states that "the proposed amendment would make it clear that after the filing of *the specified post trial motions*, a notice of appeal should await disposition of the motion."

In this case, Petitioners filed a Motion for Reconsideration after the denial of their Motion for Summary Judgment. While this Motion was pending, they filed the first Notice of Appeal. This first Notice of Appeal was *not* a nullity nor did it become ineffective pursuant to Rule 4(a)(4) for the simple reason that a Motion for Reconsideration of a denial of a Motion for Summary Judgment is *not* one of the post-trial Motions mentioned in Rule 4(a)(4).[2] In short, the first appeal was *not* a nullity under Rule 4(a)(4) and it follows that the first panel's resolution of that appeal was also not a nullity. The first Notice of Appeal was effective and, under it, the first panel had jurisdiction to make the determination that there was not appellate jurisdiction to review the District Court's denial of Petitioners' Motion for Summary Judgment.

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[2] In their Petition for Certiorari, Petitioners refer to a number of lower court decisions that, according to Petitioners, support the proposition that "petitioners' motion for reconsideration of the order denying their motion for summary

(Continued on following page)

2. The Court Of Appeals Was Correct In Concluding That The Petitioner Township Had Failed To Claim The Immunity Defense In Its Motion for Summary Judgment Before The District Court.

The Court of Appeals en banc in its June 28, 1988 decision correctly noted that Petitioner Thornbury Township did not claim immunity from suit in the District Court and that its failure to raise the immunity defense, coupled with the fact that there has been no final judgment in the case, deprives the Court of Appeals of jurisdiction to now hear a claim of immunity by the Township for the first time. A federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Hormel v. Helvering*, 312 U.S. 552 (1941). In its Motion for Summary Judgment (reproduced in full at Appendix "D"), Thornbury Township did not raise an immunity defense. Thus, the June 28, 1988 Court of Appeals en banc decision is quite correct in noting that "Appellant Thornbury Township, however, does not claim immunity from suit."

(Continued from previous page)

judgment is properly treated as a Rule 59 motion" and therefore comes within Rule 4(a)(4) of the Federal Rules of Appellate Procedure. [Pet. for Cert., p. 9]. These cases are distinguishable since they all involve *post-judgment*, motions for reconsideration, which the courts, quite sensibly treat as the functional equivalent of a Rule 59 motion. *Richerson v. Jones*, 572 F.2d 89 [3rd Cir. 1978] (motion for reconsideration filed from District Court entry of summary judgment); *Sonnenblick – Goldman Corporation v. Nowalk*, 420 F.2d 858 (3rd Cir. 1970) [motion for reconsideration filed from District Court entry of summary judgment]; *Gainey v. Brotherhood of Railway and Steam Ship Clerks*, 303 F.2d 716 (3rd Cir. 1962) [motion for re-argument following District Court entry of summary judgment].

The only legal basis advanced by Petitioner Thornbury Township in support of its Motion for Summary Judgment before the District Court was that it was entitled to "an Order granting Summary Judgment pursuant to *MacDonald et al v. Yolo County,* 54 U.S.L.W. 4782 (1986)". Petitioners' sole argument before the District Court (fashioning a *MacDonald* defense) was that the zoning review process was incomplete at the time Respondent filed the instant Complaint thereby making it impossible for the District Court to determine what damages, if any, Respondent would incur when the final zoning decisions were made. The District Court clearly distinguished the instant claim from *MacDonald* and held:

> Defendants' reliance on *MacDonald* is, however, misplaced. *MacDonald* involved an alleged taking of property. Plaintiff W.D.D., however, has alleged a Section 1983 civil rights violation. Plaintiff is not attacking the regulation; rather, it is attacking the Township's and Copeland's opposition to Plaintiff's subdivision plan. (See March 19, 1987 District Court decision, Petitioner's Appendix, p.24A).

Just as the Petitioner Township failed to claim any purported right of immunity before the District Court in its Motion for Summary Judgment, the Township again failed to raise or argue any immunity defense in its Motion for Reconsideration. Although the Township slightly shifted its theory for relief in its Motion for Reconsideration, the Township still did not claim any type of qualified immunity from suit on its own behalf. Instead, as the Court of Appeals en banc properly noted, the Petitioner Township's entire argument was premised on the assertion that Respondent had failed to establish a

claim against the Township pursuant to applicable Section 1983 case law, in particular, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1968).

Thus, while Thornbury Township in both its Motion for Summary Judgment before the District Court and subsequent Motion for Reconsideration of the District Court's March 19, 1988 Order did raise the qualified immunity defense on behalf of the individual Petitioner Copeland, the Petitioner Township neglected to assert any type of immunity defense on its own behalf.

3. Supreme Court Review Of A Panel Decision Of The Third Circuit Court Of Appeals Which Has Been Specifically Vacated By That Court En Banc Is Inappropriate.

In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court conclusively held that a local government sued under 42 U.S.C. 1983 is *not* protected by any kind of official immunity even where the individual defendants might assert a qualified immunity claim. Petitioners now seek to have this Court reverse the *Owen* holding notwithstanding the fact that neither the District Court nor the Court of Appeals en banc found it necessary to address *Owen* in any fashion since the Petitioner Township failed to raise the qualified immunity defense previously rejected by *Owen*. Moreover, Petitioners' entire argument in this portion of their Petition (Pet. for Cert. pp. 13-17) asks the Supreme Court to review the correctness of the decision of the second panel which decision has already been *vacated* by the Court of Appeals!

Argument 3 of Petitioners' Petition for Writ of Certiorari states that:

> The merits panel's decision to dismiss the Township's appeal on the ground that the Township is not entitled to the same objective qualified immunity defense afforded to its official should be reviewed by this Honorable Court "because of the importance of the immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government." [Citation omitted].[3]

The argument advanced by Petitioners in this portion of their Petition is nonsensical in that the Court of Appeals en banc made *no such holding* in its decision of June 28, 1988, which is the decision before this Court for review. Petitioners' entire argument in this portion of their Petition erroneously refers to a prior three-judge panel decision of the Third Circuit dated February 8, 1988, which decision was immediately vacated by the Court of Appeals en banc in its Order of March 31, 1988. In effect, Petitioners' entire third argument to this Court is meritless since Petitioners are asking the Supreme Court to review a decision which has been vacated by the Court of Appeals.

In summary, the Court of Appeals en banc issued no decision either in support of or contradictory to this Court's holding in *Owen v. City of Independence, supra.* There was no need since the issue was never properly

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[3] On page 6 of Petitioners' Petition for Writ of Certiorari to this Court, Petitioner characterizes the three-judge panel of the Third Circuit Court of Appeals which rendered the vacated decision of February 8, 1988 as the "merits" panel.

raised by the Petitioner Township in its Motion for Summary Judgment.

It is somewhat ironic that on page 17 of the Petition for Writ of Certiorari, the Petitioners urge this Honorable Court to hear the instant appeal so that it can "deflect the confusion and disruptions created by the principle espoused by the lower court in this case." Respondent respectfully submits that any party who petitions this Court for certiorari review of a decision which the lower court has already vacated is itself responsible for any confusion and disruptions created in the case and should not attempt to shift that blame to the lower judiciary.

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny Petitioners' request for a Writ of Certiorari and uphold the judgment of the Court of Appeals en banc.

Respectfully submitted,

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Date: September 16, 1988

APPENDIX

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APPENDIX A

WDD, INC.	)	IN THE COURT OF
	)	COMMON PLEAS
vs.	)	CHESTER COUNTY,
	)	PENNSYLVANIA
THORNBURY TOWNSHIP	)	
BOARD OF	)	NO. 86-07758
SUPERVISORS	)	CIVIL ACTION – LAW

ORDER
(Filed July 13, 1987)

AND NOW, this 10th day of July, 1987, this court having sat *en banc* in plenary reconsideration of the arguments of the parties, we are persuaded that the decision in *McVay v. Zoning Hearing Board*[1] *of New Bethlehem Borough*, 91 Pa. Cmwlth. Ct. 287, 496 A. 2d 1328 (1985), in view of the uniquely egregious comportment of Supervisor Copeland in the circumstances[2] surrounding this case, impels the conclusion that his vote should have been and must be disqualified. Under the authority of *Consumers Education & Protective Association v. Schwartz*,

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[1] We are, of course, aware of the Zoning Hearing Board procedural context of *McVay* vis-a-vis the Board of Supervisors context at bar. But in view of the quasi-judicial capacity in which this case is being heard in the township [*see*: footnote 2 of the Opinion in this case, filed March 16, 1987, citing *National Bank of Chester Co. & Trust Co. v. East Whiteland Twp.*, 27 D&C 2d 384, 393, 10 Chester 454, 460 (1962)], we nevertheless find *McVay* controlling.

[2] We are well aware that supervisors, who are fundamentally legislators, and who exist, quite properly, in the political arena, have freedom of speech. We expressly limit the precedential effect of this decision to the extraordinary factual scenario at bar.

495 Pa. 10, 432 A. 2d 173 (1981), we thus invalidate the entire decision in this case. We decline, however, to indulge in the legal fiction that there was not a decision. There clearly was a decision (albeit ultimately determined to be a tainted decision), and it was timely communicated to the parties.

The matter is remanded to the Supervisors of Thornbury Township for another vote upon the underlying question.

BY THE COURT:
/s/ Robert S. Gawthrop
/s/ Lawrence Wood
/s/ J. Curtis Joyner

APPENDIX B

THORNBURY TOWNSHIP BOARD OF SUPERVISORS, Appellant	)	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	)	No. 1977 C.D. 1987
W.D.D., INC., Appellee	)	

BEFORE: HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE EMIL E. NARICK, Senior Judge

ARGUED: JUNE 13, 1988

OPINION BY JUDGE CRAIG FILED: August 22, 1988

The Thornbury Township Board of Supervisors appeals an order of the Court of Common Pleas of Chester County invalidating a vote of the supervisors on final approval of a subdivision plan of W.D.D., Inc. (WDD), because one of the supervisors, Mr. John Copeland, should have disqualified himself from voting, and remanding the case to the supervisors for a new vote.

The issue raised in this appeal is whether a member of the board of supervisors, who appears as a private individual, represented by counsel, before the township zoning hearing board to object to an application for variances for a proposed subdivision, may subsequently participate in the board's consideration of an application for final approval of that subdivision. Because, we conclude

that, under the facts of this case, Supervisor Copeland should not have participated in consideration of WDD's application for final subdivision approval, we affirm.

The facts of the case are undisputed. In 1985, WDD purchased a 164-acre tract of land in Thornbury Township and filed a preliminary subdivision plan with the township. The township planning commission members, then including Mr. John Copeland, reviewed the preliminary plan and recommended that the board not approve the subdivision plan.

In December 1985, the subdivision plan came before the board of supervisors, and the board suggested that WDD revise its plan to conserve approximately sixteen acres of woodland. Even though variances were necessary under the board's suggested plan, to comply with the Thornbury Township Zoning Ordinance, WDD modified its plan as suggested. On December 30, 1985, the supervisors passed a resolution directing WDD to proceed to the zoning hearing board to obtain the required variances, with assurance that the supervisors' body would support WDD in proceedings before the zoning hearing board.

In January 1986, Mr. Copeland became a member of the board of supervisors. In February 1986, the zoning hearing board conducted a hearing on WDD's application for the variances. Pursuant to the supervisors' resolution of December 30, 1985, two of the supervisors appeared at the hearing in their official capacity in support of WDD's application. The third supervisor, Mr. Copeland, appeared before the zoning hearing board as a private individual, represented by counsel, to oppose WDD's

application for the variances. Mr. Copeland's attorney cross-examined WDD's witnesses, and submitted a brief in opposition to WDD's application.

On April 3, 1986, the zoning hearing board granted the variances and the preliminary subdivision plan came before the supervisors for formal approval. On April 22, 1986, WDD received a letter from Supervisor Copeland, on official stationery, advising it that the board had disapproved its plan. However, the letter was not the result of any official supervisors' action; only Supervisor Copeland had signed the letter. As Supervisor Copeland stated in the letter, under section 508 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10508(3), April 22, 1986 was the last day the board could render a decision rejecting the plan without the plan being deemed approved.[1]

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[1] Section 508 of the MPC provides:

> All applications for approval of a plat . . . whether preliminary or final, shall be acted upon by the governing body or the planning agency . . . but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than ninety days . . . following the date the application is filed. . . .
>
> . . . .
>
> (3) Failure of the governing body or planning agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented. . . .

53 P.S. §10508.

On May 21, 1986, on Supervisor Copeland's motion, the supervisors voted to have the township intervene in an appeal of the zoning hearing board's grant of variances brought by citizen-objectors.[2] The supervisors also formally voted to disapprove the preliminary subdivision plan.

On May 22, 1986, WDD filed a complaint in mandamus and a motion for peremptory judgment in the court of common pleas, requesting that, in accordance with the provisions of section 508 of the MPC, the supervisors be directed to approve its preliminary subdivision plan, and the trial court so ordered.

On July 7, 1986, WDD submitted its final subdivision plan to the supervisors for approval, the final plan being a refinement of the preliminary plan ordered approved by the court. On September 8, 1986, the supervisors met to vote on the final subdivision plan. Before the vote, WDD requested that Supervisor Copeland disqualify himself from voting due to personal prejudice and bias. Copeland refused, and, with Copeland in the majority, the supervisors voted 2 to 1 to approve the plan, but subject to conditions.

WDD appealed to the court of common pleas, asserting that the conditions attached to the approval were so onerous as to constitute a denial, and that the decision of

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[2] The court of common pleas reversed the zoning hearing board's granting of the variances. This court affirmed the decision of the court of common pleas in *Duling v. Zoning Hearing Board of Thornbury Township*, an unreported memorandum opinion at 2789 C.D. 1986, filed on September 14, 1987.

the supervisors should be vacated because of Supervisor Copeland's participation in the decision.

On July 10, 1987, the Chester County Court of Common Pleas vacated the September 8, 1986 vote which had granted conditional approval to the final subdivision plan of WDD, based on the refusal of Supervisor Copeland to disqualify himself from participating in the consideration of the plan. The trial court remanded the case for a new vote on the plan.

The supervisors contend that Copeland was not required to disqualify himself because he did not have any direct personal interest in WDD's application, distinct from that of the general public. There is no dispute that Copeland had no pecuniary interest in the application of WDD, nor is there any assertion that Copeland had any direct private interest in the application.

The supervisors cite *Levitt & Sons, Inc. v. Kane*, 4 Pa. Commonwealth Ct. 375, 285 A.2d 917 (1972). However, *Levitt* merely held that a supervisor who owns property in a zoning district that the board of supervisors is voting to rezone does not possess a disqualifying private interest. 4 Pa. Commonwealth Ct. at 382-84, 285 A.2d at 920-22.

Moreover, *Levitt* and other cases cited by the supervisors involved public officials acting in their legislative capacity. However, when a public official is acting in an adjudicative capacity, the specificity of the issue necessarily demands a more sensitive test as to disqualification.

This court noted the special standard required of a public official when functioning in an adjudicative capacity in *Davoub v. State Dental Counsel and Examining Board*, 70 Pa. Commonwealth Ct. 621, 625, 453 A.2d 751, 753 (1982):

> [A]dministrative tribunals must be unbiased and must avoid even the appearance of bias to be in accordance with the principles of due process. (Citation omitted.) In Schlesinger Appeal, 404 Pa. 584, 172 A.2d 835 (1961), the Supreme Court wrote:
>
> > 'Moreover, a predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process. Merely, "a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true" is sufficient.'
>
> 404 Pa. at 598, 172 A.2d at 841.

Thus the pivotal issue is whether the board of supervisors' vote on an application for final subdivision approval was a legislative act or an adjudicative one.

In *North Point Breeze Coalition v. Pittsburgh*, 60 Pa. Commonwealth Ct. 298, 431 A.2d 398 (1981), this court stated that, when an action of a governing body does not establish a rule of general application, but rather applies specific criteria to a single applicant and a single piece of property, the governing body is acting in its adjudicative capacity and not its legislative capacity.

In this case, the supervisors' decision as to WDD's application for subdivision approval was an action to administer planning and zoning ordinances already in existence. Moreover, consideration of WDD's application,

if approved, constituted an action granting WDD a privilege to subdivide and develop a specific tract of land. Thus, in deciding WDD's application for subdivision approval, the supervisors were acting in an adjudicative capacity.

McVay v. Zoning Hearing Board of New Bethlehem Borough, 91 Pa. Commonwealth Ct. 287, 496 A.2d 1328 (1985), concerned a member of a zoning hearing board and thus exemplifies the standard applied with respect to adjudicative officials. In *McVay*, a majority of the members of the borough zoning hearing board had signed a petition opposing the adoption of a zoning ordinance to rezone property for a low cost housing project. The borough council refused to rezone the property, and the landowner who had also applied for a special exception appeared before the zoning hearing board. The members who had signed the petition participated in the board's recognition of the request for a special exception. Under these facts, this court upheld the trial court's decision to vacate the board's rejection of the application for a special exception because of the zoning board members' bias.

In this case, the conduct of Supervisor Copeland evidenced a greater appearance of bias, if not actual bias, toward WDD's applicaton for subdivision approval than that shown in *McVay*. He personally appeared with counsel before the zoning hearing board to oppose WDD's application for variances. He sent a letter to WDD, indicating that the board rejected the preliminary application, when the board had not taken any official action on the application. The vote of the supervisors was therefore infirm.

Accordingly, we affirm the trial court's decision vacating the vote of the supervisors because of Mr. Copeland's bias and remanding the case to the board for another vote.

/s/ David W. Craig
DAVID W. CRAIG, Judge

THORNBURY TOWNSHIP BOARD OF SUPERVISORS, Appellant	)	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	)	No. 1977 C.D. 1987
W.D.D., INC., Appellee	)	

ORDER

NOW, August 22, 1988, the order of the Court of Common Pleas of Chester County, at No. 86-07258, dated July 10, 1987, is affirmed.

/s/ David W. Craig
DAVID W. CRAIG, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
AUG 22 1988

/s/ C.R. Hostutler
Deputy Prothonotary – Chief Clerk

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1382

W.D.D., Inc.

v.

THORNBURY TOWNSHIP, CHESTER COUNTY
and JOHN G. COPELAND, JR.
Appellants

ORDER

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER,* *Circuit Judges*.

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

O R D E R E D that Opinion and Judgment of the court dated February 8, 1988 is hereby vacated, and that the Clerk of this court list the case for rehearing before the court in banc on May 10, 1988.

*As to panel rehearing only.

/s/ John J. Gibbons
Chief Judge

DATED: March 31, 1988.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

W.D.D., INC.	)	
v.	)	CIVIL ACTION
THORNBURY TOWNSHIP,	)	
CHESTER COUNTY, et al	)	NO. 86-03972

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. Defendants seek an Order granting summary judgment pursuant to *MacDonald v. Yolo County*, 54 U.S.L.W. 4782 (1986).

2. Defendant Copeland seeks an Order granting summary judgment pursuant to *Mitchell v. Forsyth*, 53 U.S.L.W. 4798, 105 Sup. Ct. 2806 (1985) and *Daniels v. Williams*, 106 Sup. Ct. 662 (1986) and *Davidson v. Cannon*, 106 Sup. Ct. 668 (1986).

3. Attached hereto and marked Exhibit "A" is a true and correct copy of this Court's Memorandum and Order of August 8, 1986.

4. Attached hereto and marked Exhibit "B" is a true and correct copy of Judge Gawthrup's Order of June 13, 1986.

5. Attached hereto and marked Exhibit "C" is a true and correct copy of the Memorandum and Order of the Honorable Charles B. Smith dated August 8, 1986.

6. Attached hereto and marked Exhibit "D" is an Affidavit prepared by Henry T. Zale, Esquire, Solicitor for Thornbury Township.

7. The chronology as set forth in the Affidavit of Henry T. Zale, Esquire is incorporated by reference and is restated in defendants' accompanying Memorandum of Law.

8. Plaintiff has failed to state a claim upon which relief can be granted.

WHEREFORE, defendants demand judgment in their favor together with costs and counsel fees.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

BY: /s/ Robert G. Hanna, Jr.
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